86-871

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

STEPHEN H. SACHS, ATTORNEY GENERAL OF MARYLAND, AND ADELE WILZACK, SECRETARY OF THE MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court below err in holding that federal courts must abstain in favor of state grand jury investigations, contrary to the recent holding of the Third Circuit in *Monaghan* v. *Deakins*, 798 F.2d 632 (1986)?

2. Did the court below err in holding that abstention was appropriate in a case seeking relief under a preemptive federal statute, contrary to the holdings of the Second, Third, Fifth, Eighth, Ninth, and Eleventh Circuits?

PARTIES TO THE PROCEEDINGS

Petitioner The Potomac Electric Power Company ("PEPCO") is the electrical utility corporation that services the District of Columbia and parts of Maryland and Virginia.* Respondents are Stephen H. Sachs, in his official capacity as Attorney General of Maryland, and Adele Wilzack, in her official capacity as Secretary of the Maryland Department of Health and Mental Hygiene.

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* Pursuant to Rule 28.1, petitioner notes that it has no affiliates and no subsidiaries that are not wholly owned.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, The Potomac Electric Power Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on October 17, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 802 F.2d 1527 and is reprinted in the appendix hereto ("App.") at 1a.

The opinion of the District Court for the District of Maryland (Black, J.) on the abstention issue was de-

livered orally and is unreported. It is reprinted at App. 20a. The opinion of the District Court on the merits of the preemption issue is reported at 639 F. Supp. 856 and is reprinted at App. 31a.

JURISDICTION

Petitioner brought suit in the District Court for the District of Maryland seeking a declaratory judgment that the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.*, preempts the State of Maryland from extending its general hazardous waste regulations to the use and disposal of polychlorinated biphenyls. Petitioner moved for summary judgment. Respondents moved to dismiss, contending, *inter alia*, that the District Court should abstain. The District Court denied respondents' motion on March 25, 1986, and subsequently, on April 16, 1986, denied petitioner's motion for summary judgment and entered judgment on the merits for respondents. App. 55a-58a.

Petitioner appealed and respondents cross-appealed. The Court of Appeals for the Fourth Circuit issued an opinion on October 17, 1986, holding that the District Court should have abstained. App. 1a.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254 (1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI of the United States Constitution provides, in pertinent part, that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land."

Section 18(a)(2)(B) of the Toxic Substances Control Act, 15 U.S.C. § 2617(a)(2)(B), provides:

> if the Administrator prescribes a rule or order under section 2604 or 2605 of this title (other than a rule imposing a requirement described in subsection (a)

(6) of section 2605 of this title) which is applicable to a chemical substance or mixture, and which is designed to protect against a risk of injury to health or the environment associated with such substance or mixture, no State or political subdivision of a State may, after the effective date of such requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture, or an article containing such substance or mixture, and which is designed to protect against such risk unless such requirement (i) is identical to the requirement prescribed by the Administrator, (ii) is adopted under the authority of the Clean Air Act or any other Federal law, or (iii) prohibits the use of such substance or mixture in such State or political subdivision (other than its use in the manufacture or processing of other substances or mixtures).

STATEMENT OF THE CASE

The Potomac Electric Power Company ("PEPCO") is the electrical utility corporation that provides service in the District of Columbia and some surrounding suburbs in Maryland and Virginia. In providing service, PEPCO uses electrical transformers that it purchases from manufacturers. Until recently, the mineral oil used in many transformers was contaminated with polychlorinated biphenyls ("PCBs") during the manufacturing process.

Transformers become obsolete or unusable after a number of years, and must be scrapped. For several years United Rigging and Hauling, Inc. ("United") purchased PEPCO's scrap transformers in the District of Columbia and transported them to a United salvage yard in Beltsville, Maryland, where they were stored with transformers and scrap from other sources. In the spring of 1985, Maryland authorities discovered that the United site was contaminated with PCBs.

The use and disposal of PCBs is governed by a comprehensive federal regulatory scheme. Under Section

6(e) of the Toxic Substances Control Act, 15 U.S.C. § 2605(e), Congress directed the Administrator of the Environmental Protection Agency to promulgate rules regulating PCBs, and the Administrator has done so.[1] Congress also specified that once "the Administrator prescribes a rule or order under section 2604 or 2605 * * *, no State or political subdivision of a State may * * * establish or continue in effect, any requirement which is applicable to such substance or mixture * * *." 15 U.S.C. § 2617(a)(2)(B). Despite this preemption provision, the State of Maryland has also undertaken to regulate PCBs as a hazardous waste under its waste management program. *See* Md. Admin. Code tit. 10, § 51.

Since May 1985, the Maryland Attorney General has been investigating PEPCO's sale and delivery of scrap transformers to United, as well as the scrapping activities of United, for alleged violation of Maryland law and regulations governing PCBs. The Attorney General convened a grand jury to assist in his criminal investigation. App. 13a.

Quite apart from this pending investigation, the State's effort to regulate PCBs has had a direct and immediate effect on PEPCO's ongoing operations. The Maryland regulations have created a climate of uncertainty concerning operations at a PEPCO generating station in Maryland, since the State has yet to issue the permit for that station that it required PEPCO to apply for over two years ago. The Maryland regulations also compelled PEPCO to adopt inefficient trucking and burning practices for oil shipped to the station, since there is no storage facility at that site that complies with state as opposed to federal law. The challenged state regulations also restrict PEPCO's use of its facilities in Maryland

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[1] *See* 40 C.F.R. § 761 (1986).

for storage of electrical equipment, and have compelled PEPCO to alter its solicitation of bids for scrap transformers so as to exclude bidders who might take the transformers into Maryland. *See* Ct. App. JA at 66-69, 127-129.

In response to the foregoing, PEPCO filed a complaint in the United States District Court for the District of Maryland, seeking a declaratory judgment that the Toxic Substances Control Act preempted Maryland from extending its hazardous waste regulations to cover PCBs. Respondents moved to dismiss, arguing *inter alia* that the state grand jury investigation was a pending state judicial proceeding to which the District Court must defer under *Younger* v. *Harris*, 401 U.S. 37 (1971).

The District Court declined to abstain, noting that "[i]t is clear that PEPCO has no present opportunity to raise its Federal concerns in the Grand Jury proceedings. * * * [I]f there is no opportunity to raise the Federal issue in the State proceedings, then * * * *Younger* abstention is inappropriate." App. 28a. The court concluded that:

> There is no certainty that the Grand Jury will actually return an indictment, nor is there any indication of how long PEPCO would have to wait before it had its forum to raise the Federal defense. Under such circumstances, it would be harsh, indeed, to foreclose the opportunity to bring the preemption challenge to Federal Court prior to indictment. PEPCO has no opportunity at all to raise its Federal claim in the State Grand Jury proceedings[;] principles of abstention under *Younger*, therefore, do not apply. [*Id.* at 29a.]

The District Court subsequently ruled on the merits in favor of respondents, and PEPCO appealed. The State cross-appealed, reasserting its abstention argument.

The Court of Appeals reversed, holding that the District Court should have abstained.[2] The Court of Appeals began by noting that the "Supreme Court has never addressed the issue of whether *Younger* applies to state grand jury proceedings," and also noted that "the Supreme Court has never analyzed the treatment of a preemption claim in applying the *Younger* doctrine." App. 15a, 16a n.7. The court recognized "the requirement that the federal plaintiff have an opportunity to present the federal claim in the state proceedings." *Id.* at 17a. It held that the requirement was satisfied in this case not because of any opportunity PEPCO had before the grand jury, but because of a possible opportunity PEPCO might have *after* the grand jury concludes its work: "If indicted, PEPCO can present its claim of federal preemption by TSCA as a defense to the criminal prosecution, and therefore has an adequate opportunity to present the claim in the ongoing proceedings." *Id.* at 18a. The court also concluded that *Younger* should be applied in a preemption case, stating that "the same logic requiring abstention when there is a constitutional challenge to a state criminal statute applies to litigation where there is a claim of federal preemption due to a congressional enactment." App. 16a n.7.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Direct And Irreconcilable Conflict With The Recent Decision Of The Third Circuit In *Monaghan* v. *Deakins*

The court below held that federal courts must abstain in favor of a pending state grand jury investigation. Less than three months earlier, the Court of Appeals for the Third Circuit reached the exact opposite conclusion in an indistinguishable case, *Monaghan* v. *Deakins*, 798 F.2d 632 (1986). This Court should grant the writ to

[2] In light of its holding, the court did not consider PEPCO's appeal on the merits. *See* App. 14a.

resolve this direct and irreconcilable conflict between the Circuits on a question of overriding importance to relations between the state and federal courts and the proper functioning of our federal system.[3]

The pertinent facts in *Monaghan* are indistinguishable from those of the present case. The federal plaintiffs in *Monaghan* were the targets of an ongoing state grand jury investigation, as PEPCO is in this case. Both in *Monaghan* and in this case the state investigation involved issuance of subpoenas, search and seizure of corporate documents, and the physical search of premises. In both cases, however, the grand jury had not issued any indictments, and the State accordingly had not commenced any prosecution at the time the targets of the investigation filed suit in federal District Court.

The plaintiffs in *Monaghan* alleged in their complaint that the search of their premises was unconstitutional and sought return of the documents seized by the State. PEPCO's complaint, as noted, alleged that the Maryland law and regulations that formed the basis of the investigation were expressly preempted by federal law. In both cases the State moved for dismissal, contending that the federal court should abstain because of the pending state grand jury investigation.

The District Court in *Monaghan* agreed with the State and abstained; the District Court in this case did not. On appeal, the Third Circuit and the Fourth Circuit below framed an identical issue for decision. *Compare* 798 F.2d at 636 ("whether the existence of the state grand jury proceeding required the district court to abstain under *Younger*") *with* App. 15a ("whether *Younger* applies to state grand jury proceedings"). The

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[3] Counsel for the state authorities in *Monaghan* have advised that they will file a petition for certiorari with this Court. The petition in this case should be considered in conjunction with the petition in *Monaghan*.

two courts reached diametrically opposed conclusions. As the Third Circuit stated:

> No indictment had been returned against the plaintiffs at the time they filed their complaint in the district court. Thus there was not, for *Younger* purposes, any ongoing state proceeding warranting abstention by the district court. [798 F.2d at 637.]

The court below, however, held that no indictment was required for *Younger* abstention to apply, since PEPCO could raise its federal claim "[i]f indicted." App. 18a.

The Third Circuit in *Monaghan* recognized that "*Younger* abstention is appropriate only when there is pending a proceeding in which a state court will have the authority to *adjudicate* the merits of a federal plaintiff's federal claims." 798 F.2d at 637 (emphasis in original). The court noted that a New Jersey grand jury cannot adjudicate anything, but can only "issue an indictment, which is no more than a charge that the defendant has violated the criminal law." *Id.* Only when an indictment is returned does a state judicial proceeding commence, thereafter affording an opportunity to have the federal claims adjudicated. *Id.*[4]

Maryland grand juries are no different from their counterparts in New Jersey, and they too cannot adjudicate the claims of targets or witnesses.[5] The court below

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[4] Judge Adams dissented from the panel opinion in *Monaghan* and from the subsequent denial of petition for rehearing *en banc.* 798 F.2d at 639-645.

[5] *See In re Special Investigation No. 237,* 54 Md. App. 201, 203, 458 A.2d 450, 452 ("a mere witness, even if the witness might possibly at some future time become a defendant, is utterly incompetent to challenge the authority of the grand jury to act"), *cert. denied,* 296 Md. 414 (1983); *In re Special Investigation No. 224,* 54 Md. App. 137, 458 A.2d 454, *cert. denied,* 296 Md. 414 (1983). The role of the grand jury in New Jersey and Maryland is the same as that of the grand jury in the federal system, and clearly does

did not rely on any opportunity PEPCO might have to raise its preemption claim before the grand jury, since there clearly is no such opportunity. Where the Third Circuit declined to order abstention on the basis of a possible future indictment, however, the court below held that abstention was required precisely because of that possibility.

The conflicting holdings of the Third Circuit and the Fourth Circuit below cannot be reconciled.[6] Nor is it likely that either court will reconsider its holding. This is not a situation in which arguments or theories not raised before one court might cause that court to re-evaluate its position, or a situation in which one court had the benefit of guidance from this Court not available to the other. *Monaghan* was decided after argument but before decision below, and counsel alerted the court below to the *Monaghan* decision. The court below was thus fully aware of the views of the Third Circuit, but nonetheless adopted directly contrary reasoning and reached the opposite conclusion. Judge Adams's dissent in *Monaghan* advanced the same arguments accepted by the court below, and failed to dissuade the Third Circuit from its conclusion.[7]

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not include the adjudication of legal claims such as those raised by PEPCO. *See United States* v. *Calandra*, 414 U.S. 338, 345 (1974).

[6] If anything, *Monaghan* was a stronger case for abstention than this one. In *Monaghan*, the federal plaintiffs' claim was at least directed to the conduct of the grand jury investigation itself, seeking return of documents seized in the course of the investigation. Here, the relief sought does not go directly to the operation of the grand jury but only to the underlying law being applied. Indeed, PEPCO has fully complied with the various subpoenas with which it has been served.

[7] The District Courts have also provided conflicting answers to the question whether it is appropriate to abstain under *Younger* in favor of a state grand jury investigation. *See, e.g., Brennick* v. *Hynes*, 471 F. Supp. 863, 867 (N.D.N.Y. 1979) (*Younger* "does not apply to state grand jury proceedings where the target for investi-

II. The Court Below Misinterpreted This Court's Abstention Decisions In Extending *Younger* To Grand Jury Investigations

The court below correctly recognized that this Court "has never addressed the issue of whether *Younger* applies to state grand jury proceedings." App. 15a. The decision to apply *Younger* in the present case, however, was not only directly contrary to that of the Third Circuit but also inconsistent with this Court's pronouncements on abstention. The court below, like the lower court in an earlier Supreme Court case, was "under the misapprehension that the *Younger* doctrine applied when there is a threatened state criminal prosecution as well as when there is a state criminal prosecution already pending." *Ellis* v. *Dyson*, 421 U.S. 426, 433 (1975). No prosecution is pending against PEPCO. The only action the State has taken has been to commence an investigation of PEPCO, an investigation that is now in its nineteenth month. The fact that the State has invoked the assistance of a grand jury as an investigative tool does not transform the investigation into a pending state judicial proceeding to which federal courts must defer.

Abstention under *Younger* is appropriate only if there is an "ongoing state judicial proceeding" that "implicate[s] important state interests" and if there is "an

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gation has no immediate recourse to state courts"); *Sovereign News Co.* v. *Falke*, 448 F. Supp. 306 (N.D. Ohio 1977) (*Younger* abstention appropriate in favor of grand jury proceeding), *remanded on other grounds*, 610 F.2d 428 (6th Cir. 1979); *Notey* v. *Hynes*, 418 F. Supp. 1320, 1326 (E.D.N.Y. 1976) (same). *See also Langley* v. *Ryder*, 602 F. Supp. 335, 338-339 (W.D. La.) (*Younger* abstention inapplicable when arrest warrants were issued and arrests made but no indictments had been filed), *aff'd on other grounds*, 778 F.2d 1092 (5th Cir. 1985); *Four Unnamed Plaintiffs* v. *Hall*, 424 F. Supp. 357, 362 (D. Mass. 1976) (*Younger* does not "require federal courts to avoid interference with state criminal or administrative proceedings in the *pre-indictment* stage") (emphasis in original), *rev'd on other grounds*, 550 F.2d 1291 (1st Cir. 1977).

adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). In this case there is no ongoing judicial proceeding affording PEPCO *any* opportunity to raise its preemption claim.[8] A grand jury investigation is not a "judicial proceeding" for abstention purposes. The court below dismissed this element of the test for abstention in a footnote, noting that "grand juries operate under the auspices of the judicial branch." App. 16a n.8. That is not, however, the pertinent inquiry. Regardless of the extent to which grand juries are or are not supervised by the courts, the grand jury proceeding itself is not " 'judicial in nature.' " *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 106 S. Ct. 2718, 2723 (1986) (quoting *Middlesex County*, 457 U.S. at 433).

The requirement that the pending state proceedings be "judicial in nature" to command abstention looks not to the extent of supervision or control by the courts but rather to the function and nature of the proceeding itself. When this Court has extended *Younger* to state proceedings that were not in the state courts themselves, those proceedings have always been "judicial in nature" in that the agencies had adjudicatory responsibilities and functioned like courts, issuing a decision on the merits after hearing from both sides of a dispute and affording the affected private party an opportunity to present arguments and evidence.

Thus, in *Middlesex County*, this Court held that abstention was appropriate in favor of proceedings before a state bar ethics committee. The Court looked to "the nature of the proceedings" in determining that they could

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[8] Nor, in light of PEPCO's preemption claim, can the grand jury investigation be considered to implicate important state interests. A state can have no legitimate interest in enforcing regulations preempted by federal law. *See infra* at 20-25.

be considered "an ongoing state judicial proceeding" for abstention purposes. *Id.* at 435, 432. As the Court noted:

> [A] formal hearing on the complaint is held before three or more members of the Ethics Committee, a majority of whom must be attorneys. The lawyer who is charged with unethical conduct may have counsel, discovery is available, and all witnesses are sworn. The panel is required to prepare a written report with its findings of fact and conclusions. [*Id.* at 426-427.]

In other words, the ethics committee functioned like a court in considering the charge and rendering its decision, and abstention was therefore appropriate.

Similarly, in *Ohio Civil Rights Comm'n*, this Court held that abstention was appropriate in favor of proceedings before the state agency charged with adjudicating civil rights complaints. Those proceedings were commenced by the filing of a complaint, the charged party was given an opportunity to respond, and the agency conducted a full adversarial hearing. The charged party could appear in person or through an attorney and could examine and cross-examine witnesses. *See* 106 S. Ct. at 2721; Ohio Rev. Code Ann. § 4112.05 (Supp. 1985). The agency action constituted "a formal adjudication of the matter," and the proceeding could thus be considered " 'judicial in nature' " for abstention purposes. 106 S. Ct. at 2721, 2723 (quoting *Middlesex County*, 457 U.S. at 433).

The agencies in both *Middlesex County* and *Ohio Civil Rights Comm'n* functioned as courts, and the proceedings before them thus " 'command the respect due court proceedings' " under *Younger*. *Ohio Civil Rights Comm'n*, 106 S. Ct. at 2723 (quoting *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973)). In contrast, the Court declined to require abstention in favor of a state administrative proceeding in *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984). The proceeding in that case was not a formal adjudication similar to a court proceeding but

rather mandatory arbitration before the state agency. *See id.* at 238. The mandatory arbitration was in advance of and not any part of the subsequent court action, *id.*, and the arbitration itself—unlike the formal agency adjudication in *Middlesex County* and *Ohio Civil Rights Comm'n*—could not be considered "judicial in nature." [9]

A state grand jury proceeding is nothing like the formal agency adjudication in *Middlesex County* and *Ohio Civil Rights Comm'n*, or any of the other agency proceedings in cases in which abstention has been ruled proper. As the court noted in *Monaghan*, a state grand jury does not have "the authority to adjudicate anything." 798 F.2d at 637. A Maryland grand jury, like its counterparts in New Jersey and the federal system, "is an accusing body, and not a judicial tribunal." *Coblentz* v. *State*, 164 Md. 558, 566, 166 A. 45, 49 (1933). "[A] grand jury is an accusatory body which hears but one side of a case, not a trier of fact which hears both sides of a case and makes a determination accordingly."

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[9] In *Ohio Civil Rights Comm'n*, this Court cited with approval four lower court decisions ruling that *Younger* could be applied to state administrative proceedings that were "judicial in nature." 106 S. Ct. at 2723 n.2. Those cases clearly indicate that abstention is only appropriate when the pending proceeding itself is like a court proceeding. *See Williams* v. *Red Bank Board of Education*, 662 F.2d 1008, 1015 (3d Cir. 1981) (abstention in favor of state administrative proceeding that was "a quasi-judicial, adjudicatory proceeding that in many respects resembles the judicial proceedings to which *Younger* has already been held to command deference"); *McCune* v. *Frank*, 521 F.2d 1152, 1153 (2d Cir. 1975) (abstention in favor of "trial" before state police disciplinary board); *McDonald* v. *Metro-North Commuter Railroad Division of Metropolitan Transit Authority*, 565 F. Supp. 37, 39 (S.D.N.Y. 1983) (abstention appropriate when claims could be raised in multi-tiered administrative "trials"); *Grandco Corp.* v. *Rochford*, 536 F.2d 197, 206 (7th Cir. 1976) (abstention *not* appropriate when proceedings are not before "any established adjudicatory body").

Bartram v. *State*, 280 Md. 616, 633, 374 A.2d 1144, 1152 (1977).[10] As the Third Circuit emphasized in *Monaghan*:

> A grand jury proceeds *ex parte*. * * * It can issue an indictment, which is no more than a charge that the defendant has violated the criminal law. Only when such a charge is filed does there commence a judicial proceeding that affords the adjudicatory opportunity that *Hawaii Housing* and *Middlesex County* require. [798 F.2d at 637 (footnote omitted).]

It is the function of a grand jury to investigate and charge—not to adjudicate.[11] A grand jury investigation, therefore, cannot be considered to constitute an ongoing state proceeding that is "judicial in nature" for *Younger* purposes.

Moreover, the various proceedings in favor of which federal courts have abstained have been ones where the federal claims could be raised and considered. PEPCO had no opportunity—let alone an adequate opportunity—to raise its preemption claim before the grand jury investigating its activities. The State does not suggest that PEPCO could do so, and Maryland law rather clearly precludes any effort by a grand jury witness or the target of an investigation to challenge the authority of the grand jury to act.[12] Nor did the court below suggest that PEPCO could raise its claim in the only state pro-

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[10] *See United States* v. *Calandra*, 414 U.S. at 343 ("A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated").

[11] *See United States* v. *Cleary*, 265 F.2d 459, 461 (2d Cir.) ("Basically the grand jury is a law enforcement agency"), *cert. denied*, 360 U.S. 936 (1959).

[12] *See In re Special Investigation No. 237, supra; In re Special Investigation No. 224*, 54 Md. App. at 145, 458 A.2d at 458 (" 'a witness * * * is not interested to challenge the jurisdiction of court or grand jury over the subject-matter that is under inquiry' ") (quoting *Blair* v. *United States*, 250 U.S. 273, 279 (1919)).

ceeding then pending—the grand jury investigation. Rather, the court required abstention because of the opportunity PEPCO would have to raise its claim in a "separate" prosecution that might be commenced at some point in the future. App. 18a.

This Court, however, has never required abstention when the plaintiff had no present opportunity to raise his federal claims in *pending* state adjudicatory proceedings. Abstention results in dismissal of the federal suit in order to permit the federal claims to be raised in the pending state proceeding, not to preclude or delay litigation of those claims. If there is no pending proceeding in which the federal claims can be adjudicated, there is no justification for a federal court to abdicate jurisdiction and deny the federal plaintiff any opportunity to have his claims heard. In such a case, federal courts must "fulfill their duty to adjudicate federal questions properly brought before them." *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. at 238.

The court below relied upon *Middlesex County* and *Ohio Civil Rights Comm'n* for the proposition that "an adequate opportunity exists when the federal plaintiff can present its claim on judicial review of the state administrative action or order." App. 17a. Neither *Middlesex County* nor *Ohio Civil Rights Comm'n*, however, based abstention on the mere *possibility* of an opportunity to raise federal claims at *some* point in the future. In *Middlesex County* there was no question that the federal claims could be raised and decided in the pending agency proceeding, and the federal plaintiff could raise those claims again on review in the state Supreme Court. *See* 457 U.S. at 435-436, 427. The Court in *Ohio Civil Rights Comm'n* assumed that the federal claims could be considered in the pending agency proceeding,[13] and noted that "[i]n any event" the claims

[13] As the Court noted, "even if Ohio law is such that the Commission may not consider the constitutionality of the statute under

could be raised through the judicial review provided as a matter of statutory right by the same law authorizing the agency adjudication. 106 S. Ct. at 2724. The statute specified that review actions "shall be heard and determined as expeditiously as possible." Ohio Rev. Code Ann. § 4112.06(I) (1980). The agency adjudication and judicial review were parts of a single pending proceeding, and the federal plaintiff could raise his claims in that proceeding.

PEPCO, however, will only have an opportunity to raise its claims "[i]f indicted." App. 18a. A criminal prosecution is not in any sense "judicial review" of a grand jury proceeding. The two proceedings are entirely separate and addressed to quite distinct questions.[14] "It is clear * * * that the investigation of a grand jury is a proceeding which is wholly separate and distinct from, and of a different nature than, the subsequent trial of the defendant in the district court." *In re Neff*, 206 F.2d 149, 152 (3d Cir. 1953). *See United States* v. *Coachman*, 752 F.2d 685, 691 (D.C. Cir. 1985) ("A grand jury investigating a suspect and a court trying an accused * * * engage in separate and dissimilar functions").[15] Indeed, the court below expressly acknowledged that the grand jury proceeding was "separate" from any possible future proceeding at which PEPCO could raise its claims. App. 18a. Thus, even if *Ohio Civil Rights*

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which it operates, it would seem an unusual doctrine * * * to say that the Commission could not construe its own statutory mandate in the light of federal constitutional principles." 106 S. Ct. at 2724.

[14] For example, a finding after trial that a defendant is innocent does not mean that the grand jury was wrong in determining that there was a sufficient basis for indictment.

[15] *See also United States* v. *Housand*, 550 F.2d 818, 821 n.3 (2d Cir.) (grand jury proceeding and case growing out of it "separate"), *cert. denied*, 431 U.S. 970 (1977); *United States v. Malone*, 111 F. Supp. 37, 38-39 (N.D. Cal. 1953) (grand jury and later case "independent" proceedings).

Comm'n is read most broadly as authorizing abstention when claims can be raised on a judicial review that is part of the pending adjudicatory proceeding, it does not control the present case. A grand jury investigation is not an adjudicatory proceeding, a subsequent criminal prosecution is not a part of that pending proceeding, and such a prosecution is not a "review" of any adjudication arising from that proceeding.

It is one thing to hold that abstention is proper when federal claims can be raised on review of a *pending* proceeding; it is quite another to require abstention on the basis of a possible separate *future* proceeding. Abstention is only appropriate when "federal claims have been or could be presented in *ongoing* judicial proceedings," *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. at 237 (emphasis supplied), not when they could be presented in proceedings that have yet to commence.[16] The lack of a particular pending proceeding indicates that an opportunity may never materialize, or that it may not materialize in timely fashion. Federal courts cannot take the momentous step of dismissing an action within their jurisdiction on the strength of such mere possibilities. As the Court concluded in *Steffel* v. *Thompson*, 415 U.S. 452, 472 (1974): "Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head."

As noted, the grand jury investigation in this case has been pending for nineteen months, and PEPCO has yet to be indicted. The investigation in *Monaghan* was pending for eighteen months without indictment when the Third Circuit issued its opinion. 798 F.2d at 634.

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[16] As this Court has said: "*Younger* v. *Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts. Such a course naturally presupposes the opportunity to raise and have *timely* decided by a competent state tribunal the federal issues involved." *Gibson* v. *Berryhill*, 411 U.S. at 577 (emphasis supplied).

The opportunity to raise federal claims in *Ohio Civil Rights Comm'n* was available at the very latest upon review of a then-pending proceeding. There is no telling when—if ever—PEPCO will have the opportunity to raise its federal claims.

The court below reasoned that PEPCO's federal rights were fully protected since PEPCO could raise its preemption claim if indicted, apparently assuming that if PEPCO were not indicted the issue would simply go away. PEPCO, however, did not seek declaratory relief simply to forestall indictment. As noted previously, Maryland's insistence on regulating PCBs in defiance of the express preemption provision in federal law has directly affected PEPCO's ongoing business operations, quite apart from the subject matter of the grand jury investigation. Even in the absence of possible indictment, PEPCO would still have a compelling reason to seek declaratory relief. The decision below permits the State to deny PEPCO its right to have its federal claim decided, simply by continuing the grand jury investigation. So long as that investigation continues, PEPCO is precluded from raising its claim. Such a result is a perversion of the principles animating *Younger*. The purpose of *Younger* abstention is to have federal claims decided in pending state judicial proceedings, not to permit a State to hold such claims hostage awaiting the commencement of such proceedings.

The decision below permits state authorities to preclude access to federal court through the simple expedient of invoking the aid of a grand jury in an investigation. Apparently any involvement by a grand jury is sufficient to mandate abstention under the ruling below. Since grand juries operate *ex parte* and in secret, a plaintiff would typically have no way of knowing that his federal suit was barred until after it was filed, *if* the State chooses at that time to disclose the pendency of its grand jury investigation.

Indeed, the State need not even commence its investigation prior to the filing of the federal suit. Under *Hicks* v. *Miranda*, 422 U.S. 332, 349-350 (1975), abstention is required even when the state proceedings begin after filing of the federal suit, so long as there have been no proceedings of substance on the merits in the federal suit. The decision below thus invites States to respond to suit in federal court simply by initiating an investigation directed at the federal plaintiff, thereby divesting the federal court of jurisdiction

The ruling below also may well have the unintended result of increasing the disruption of state proceedings by federal courts that *Younger* was intended to prevent. Under that ruling, it will be necessary for federal courts to determine if in fact the federal plaintiff is the target of a pending state grand jury investigation. The necessity of such a finding not only deprives the grand jury of the secrecy that is often critical to its investigative efforts,[17] but also may require the federal court to scrutinize and intrude upon the operations of the state grand jury. If the federal plaintiff challenges the State's assertion that he is the target of a grand jury investigation, some factfinding by the District Court will be necessary to resolve the dispute. Such factfinding could well include testimony by the state prosecutor and the grand jurors themselves, as well as review of testimony and evidence presented to the grand jury to determine if the federal plaintiff is in fact a target. Presumably it would be necessary to permit discovery on these issues. It is difficult to discern how such necessary proceedings would promote the "proper respect for state functions" underlying *Younger*, 401 U.S. at 44.[18]

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[17] *See United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983) ("the traditional rule of grand jury secrecy"); *United States* v. *Johnson*, 319 U.S. 503, 513 (1943) ("the indispensable secrecy of grand jury proceedings").

[18] These issues are not merely hypothetical. In *Monaghan* v. *Deakins*, 798 F.2d at 636 n.4, the plaintiffs claimed that they were

Nor is there any apparent reason to restrict the decision below to investigations aided by a grand jury. The States are not required to employ grand juries,[19] and in many States prosecutors are authorized to " 'take[] the place of a grand jury' " in conducting investigations. *Kaylor* v. *Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981) (quoting *Johnson* v. *State*, 199 Ark. 196, 204, 133 S.W.2d 15, 18 (1939)).

The logic of the court below would seem to require abstention in favor of *any* pending state investigation: if the investigation—however conducted—culminates in a prosecution, the defendant can raise his federal claims at that point. The fact that such a result is implicit in the ruling below simply highlights the fundamental error in requiring abstention in favor of a mere investigation rather than an actual prosecution.

III. The Court Below Erred In Requiring Abstention In A Case Involving A Preemptive Federal Statute

As noted above and as the court below recognized, "the Supreme Court has never analyzed the treatment of a preemption claim in applying the *Younger* doctrine." App. 16a n.7. At least six other Circuits have, however, and each has held—contrary to the decision below—that *Younger* generally does not apply in a preemption case. Indeed, application of the contrary rule adopted by the court below would have meant that several of this Court's most important decisions holding that federal law preempted state law would never have been

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not in fact subject to a state grand jury investigation, and the Court of Appeals noted that the finding by the District Court that they were was not supported by the sources cited by the District Court. The holding of the Third Circuit that abstention was not appropriate in favor of grand jury proceedings avoided the necessity of resolving the factual challenge.

[19] *See Rose* v. *Mitchell*, 443 U.S. 545, 557 n.7 (1979); *Hurtado* v. *California*, 110 U.S. 516 (1884).

decided, given the pendency of some kind of state investigative effort directed against the plaintiff at the time the preemption ruling was sought.[20]

The decision in *Younger* was based on "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. at 44. When Congress expressly preempts state jurisdiction, however, it has determined that state regulation is not a separate "state function" that the State should be left free to perform in its "separate way." Abstaining in such a case permits the State to do precisely what Congress has decreed it must not do. Congress is free under the Supremacy Clause to preempt state law, and at least when Congress has expressly done so, federal courts should not undermine that determination by deferring to preempted state proceedings.[21] For these reasons, Courts of Appeals in the Second, Third, Fifth, Eighth, Ninth, and Eleventh Circuits have held that abstention under *Younger* is generally not appropriate in a preemption case.

In *Stone & Webster Engineering Corp.* v. *Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi* v. *Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983), the Second Circuit considered an ERISA preemption claim, and declined to abstain in favor of a pending state proceeding. As the court concluded: "Abstention * * * under the doctrine of *Younger* v. *Harris* * * * is not appropriately invoked in a preemption case." 690 F.2d at 326 n.2. *See also id.* at 326 n.3; *Marshall*

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[20] *See, e.g., Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984).

[21] *See* 1A Moore's Federal Practice ¶ 0.203[2] at 2141 ("Where the very existence of the challenged state regulatory scheme violates a federal statute that preempts the field, neither *Pullman, Burford,* nor *Younger* abstention may be appropriate").

v. *Chase Manhattan Bank*, 558 F.2d 680, 683-684 (2d Cir. 1977).[22]

This same approach to abstention in preemption cases was followed by the Third Circuit in *Hotel & Restaurant Employees International Union* v. *Danziger*, 709 F.2d 815 (3d Cir. 1983), *vacated on other grounds*, 468 U.S. 491 (1984). In that case a union sought a declaratory judgment that the labor provisions of the New Jersey Casino Control Act were preempted by federal labor law and ERISA. The court rejected the argument that it should abstain in favor of a pending state proceeding, concluding that "when the issue tendered to a federal district court is the very power, as a matter of federal law, to entertain a threatened proceeding, the principles of comity and federalism which apparently animate the *Younger* v. *Harris* rule are totally inapplicable." 709 F.2d at 833.[23]

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[22] In *Marcal Paper Mills, Inc.* v. *Ewing*, 790 F.2d 195 (1st Cir. 1986), the First Circuit expressed "no opinion as to * * * whether or not there should be a preemption exception to the *Younger* abstention doctrine," but it did recognize that the Second Circuit has held "that *Younger* abstention is generally inappropriate in cases involving issues of federal preemption." *Id.* at 198 (citing *Stone & Webster Engineering Corp.* v. *Ilsley, supra*). *See also Town of Springfield, Vermont* v. *McCarren*, 549 F. Supp. 1134, 1153 (D. Vt. 1982) (court declines to abstain under *Younger* because "the customary deference to state enforcement efforts is suspended when * * * the plaintiffs' challenge is that those efforts are preempted"), *aff'd mem.*, 722 F.2d 728 (2d Cir.), *cert. denied*, 464 U.S. 942 (1983).

[23] In *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n*, 791 F.2d 1111, 1116-17 (3d Cir. 1986), another panel of the Third Circuit noted in passing that it would be an "overstatement" to suggest that *Younger* was never appropriate in a preemption case, but cited the fact that the federal claim was one of preemption as a factor counselling against the application of *Younger*. The court held that the District Court erred in abstaining. In *United Services Automobile Ass'n* v. *Muir*, 792 F.2d 356, 364 n.4 (3d Cir. 1986), the court referred to the holding in *Kentucky West Virginia Gas Co.* that "preemption questions are often not

In *South Central Bell Telephone Co.* v. *Louisiana Public Service Comm'n*, 744 F.2d 1107 (5th Cir. 1984), *vacated and remanded on other grounds*, 106 S. Ct. 2884 (1986), the court declined to apply *Younger* abstention to a claim that federal law preempted state regulation of telephone service. As the court noted, "the claim presented here is predicated upon a naked exercise of the federal preemption power." Under such circumstances, it is "well-established" that the concern of " 'avoiding needless federal court intervention into important matters within the state's jurisdiction * * * obviously is lacking.' " *Id.* at 1123 (quoting *Aluminum Company of America* v. *Utilities Commission of North Carolina*, 713 F.2d 1024, 1030 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984).[24]

The Eighth Circuit similarly held that *Younger* abstention was not appropriately involved in a preemption case in *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 884 (1986). The federal plaintiff alleged that the Federal Power Act preempted efforts by a state utility commission to regulate contracts for the

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suitable for abstention under the doctrines announced in *Burford* and *Younger*."

[24] *New Orleans Public Service, Inc.* v. *City of New Orleans*, 798 F.2d 858 (5th Cir. 1986), is not to the contrary. The court in that case upheld abstention under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), noting only in dicta that *Younger* abstention also "seems appropriate" and "could be" the basis for the District Court's decision to abstain. 798 F.2d at 863-864. The court expressly recognized that "abstention in the face of a federal preemption claim is, at a minimum, problematical." *Id.* at 860. It upheld abstention only because of the "particular structure" of the federal statute at issue in that case. *Id.* Far from expressly preempting state law —as does the statute at issue in this case—the statute in *New Orleans Public Service* expressly "preserved to the states" jurisdiction over the subject of the federal plaintiff's claim. *Id.* at 864, 860. Indeed, the court specifically cautioned that its holding should not necessarily apply "in cases presenting other types of federal preemption claims." *Id.* at 861.

interstate purchase of power, much as PEPCO alleges in this case that a federal statute preempts efforts by Maryland to regulate PCBs. The court declined to abstain in favor of pending proceedings before the Commission, reasoning that the comity underlying *Younger*

> is not strained when a federal court cuts off state proceedings that entrench upon the federal domain. The legitimate state interest contemplated by *Younger* does not exist when the state action has been preempted or foreclosed by the Constitution. [772 F.2d at 417 (citations omitted).]

In *Champion International Corp.* v. *Brown*, 731 F.2d 1406 (9th Cir. 1984), the plaintiff filed suit in Federal District Court, alleging that Montana's age discrimination law was preempted by ERISA. The District Court abstained under *Younger* in favor of pending state administrative and court proceedings, and the Ninth Circuit reversed. The Court of Appeals recognized that *Younger* abstention is only appropriate if the pending state proceeding implicates important state interests, and held that a state can have *no* interest in enforcing state laws expressly preempted by Congress. *Id.* at 1408-09.

Baggett v. *Department of Professional Regulation*, 717 F.2d 521 (11th Cir. 1983), involved an action by a marine pilot seeking to enjoin a state inquiry into his piloting of a tugboat. The pilot claimed that his actions were subject to the exclusive regulation of the U.S. Coast Guard. The State argued that the District Court should abstain in favor of the state proceeding, and that court agreed. On appeal, the Eleventh Circuit held that the District Court erred in abstaining: "When preemption is readily apparent, * * * and, because of preemption, the state tribunal is acting beyond the lawful limits of its authority, abstention can serve no principles of 'comity' or of 'our federalism.'" *Id.* at 524.[25]

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[25] Like the court in *Kentucky West Virginia Gas Co., supra*, the Eleventh Circuit remarked in dicta that it would be an "overstate-

The court below simply ignored the foregoing, dismissing the argument that abstention does not apply in a preemption case in a brief footnote. *See* App. 16a n.7. In contrast to the six Circuits surveyed above, the court below held that "the same logic requiring abstention when there is a constitutional challenge * * * applies to litigation where there is a claim of federal preemption." *Id.* The court stated that it would be "anomalous" to hold that abstention is appropriate for constitutional but not preemption issues.

No such anomaly exists. In a typical case in which abstention *is* appropriate, the federal claim is not that the State is entirely disabled from acting in the area. In *Ohio Civil Rights Comm'n*, for example, the claim was not that the State could not enforce civil rights laws, but that they could not be applied in a manner that interfered with the federal plaintiffs' rights under the Free Exercise Clause. In a preemption case such as the present one and those discussed above, the claim is qualitatively different. It is that *any* action the State takes in the area would contravene federal law. Here, PEPCO's claim is that Congress has expressly preempted state regulation of PCBs. Abstaining from deciding this claim in favor of possible state proceedings would deprive PEPCO of the very right it seeks to have vindicated—the right to be free of state regulation of PCBs.

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ment" to assert that *Younger* abstention was never appropriate in a preemption case. 717 F.2d at 524. The judicious reluctance of the court to announce an absolute rule, applicable in every conceivable case, certainly does nothing to diminish the conflict with the ruling of the court below that preemption claims should be treated no differently than other federal claims for abstention purposes. The *Baggett* and *Kentucky West Virginia Gas Co.* courts were presumably concerned about cases in which the preemption claim was clearly spurious and perhaps raised only to avoid abstention, a situation hardly presented by this case, in which federal preemption is express and preemption is the sum and substance of the plaintiff's claim.

IV. The Uniform Resolution Of The Questions Presented Is Of Overriding Importance To The Smooth Functioning Of The Federal System

The issues over which the Fourth Circuit has split from the other Circuits are ones on which there is a clear need for national uniformity. The same principles animating the *Younger* doctrine require that *Younger* be applied in a consistent fashion to identical proceedings in different States.

Younger was based on "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments." 401 U.S. at 44. Such respect is hardly fostered when the federal courts effectively differentiate among the States for purposes of abstention. If the ruling below stands, federal courts will defer to the grand jury proceedings of Maryland, Virginia, North Carolina, South Carolina, and West Virginia, but not to those of Pennsylvania, New Jersey, and Delaware. In the Second, Third, Fifth, Eighth, Ninth, and Eleventh Circuits, federal courts generally do not abstain in favor of state proceedings when the federal plaintiff claims Congress has expressly preempted state law. In the Fourth Circuit, they will. A "proper respect" for the States by the federal judiciary requires, at the very least, that the federal judiciary not treat identical state proceedings differently depending on the State in which they take place.

For the reasons developed above, "sensitivity to the legitimate interests of both State and National Governments," *id.*, does not require abstention by federal courts in favor of pending state grand jury investigations. If federal courts do abstain in favor of the grand jury proceedings of New Jersey, however, this sensitivity requires that they similarly defer to grand jury proceedings of Maryland, or that if they do not defer to Maryland proceedings, they similarly not defer to New Jersey

proceedings. By the same token, a federal court in New York presented with a claim based on federal preemption will not abstain in favor of New York State proceedings, while a federal court in Maryland presented with the identical claim under the same federal statute will abstain in favor of identical Maryland proceedings.

There are situations in which the uniform application of federal law, while always desirable, is not critical. In some cases Congress can resolve any conflict in interpretation, or a conflict may be tolerated for several years as issues are refined and sharpened. The abstention doctrine, however, was created by this Court; only this Court can ensure its uniform application. And disparity in treatment of the sovereign States by the lower federal courts is not an issue on which conflict may be tolerated. Review by this Court is necessary to ensure uniformity in this delicate area of state-federal relations.

The issue over which the Third and Fourth Circuits have split will arise repeatedly. Grand juries are constantly sitting in States throughout this country.[26] In some cases they act, and in others they do not. To hold that the mere pendency of such secret proceedings—or of other investigative procedures—suffices to preclude a legitimate claim of federal preemption from being raised and decided would effect a dramatic shift in present law. At the very least it would mean that grand jurors and prosecutors could act unchecked on the basis of state laws expressly preempted by Congress. Such a power in the hands of prosecutors should not be sanctioned without this Court's approval. Indeed, the decision below could well prompt changes in state investigative practices,

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[26] Grand jury indictments are required for specified crimes in half the States, and the use of a grand jury is optional at the discretion of the prosecutor in the other States. National Institute of Justice, *Grand Jury Reform: A Review of Key Issues* 12 (1983).

with prosecutors going through the formality of enlisting the aid of a grand jury at the earliest stages of an investigation to insulate the investigation from any scrutiny by federal courts.

Similarly, the large number of Circuits that have recently addressed the question of the appropriateness of abstention in federal preemption cases demonstrates that the issue arises with great frequency. This Court should grant the writ to resolve the existing conflict among the Circuits and provide definitive guidance to the lower federal courts on these significant and recurring issues of federal jurisprudence.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1572

THE POTOMAC ELECTRIC POWER COMPANY,
Appellant,

versus

STEPHEN H. SACHS, in his capacity as Attorney General of Maryland; ADELE WILZACK, in her capacity as Secretary of the Maryland Department of Health and Mental Hygiene,
Appellees,

STATE OF NEW YORK
Amicus Curiae,

STATE OF ALABAMA,
Amicus Curiae,

NIAGARA MOHAWK POWER CORPORATION,
Amicus Curiae,

EDISON ELECTRIC INSTITUTE,
Amicus Curiae,

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Amicus Curiae,

AMERICAN PUBLIC POWER ASSOCIATION,
Amicus Curiae,

AMERICAN ELECTRIC POWER SERVICE CORPORATION,
Amicus Curiae,

APPALACHIAN POWER COMPANY,
Amicus Curiae,

COLUMBUS & SOUTHERN OHIO ELECTRIC COMPANY,
Amicus Curiae,

INDIANA & MICHIGAN ELECTRIC COMPANY,
Amicus Curiae,

OHIO POWER COMPANY,
Amicus Curiae,

ATLANTIC CITY ELECTRIC COMPANY,
Amicus Curiae,

BALTIMORE GAS & ELECTRIC COMPANY,
Amicus Curiae,

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Amicus Curiae,

CENTRAL ILLINOIS LIGHT COMPANY,
Amicus Curiae,

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Amicus Curiae,

CENTRAL & SOUTH WEST SERVICES,
Amicus Curiae,

COMMONWEALTH EDISON COMPANY,
Amicus Curiae,

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Amicus Curiae,

DAYTON POWER & LIGHT COMPANY,
Amicus Curiae,

DELMARVA POWER & LIGHT COMPANY,
Amicus Curiae,

DUKE POWER COMPANY,
Amicus Curiae,

DUQUESNE LIGHT COMPANY,
Amicus Curiae,

FLORIDA POWER & LIGHT COMPANY,
Amicus Curiae,

HOUSTON LIGHTING & POWER COMPANY,
Amicus Curiae,

ILLINOIS POWER COMPANY,
Amicus Curiae,

INDIANAPOLIS POWER & LIGHT COMPANY,
Amicus Curiae,

IOWA POWER & LIGHT COMPANY,
Amicus Curiae,

CINCINATTI GAS & ELECTRIC COMPANY,
Amicus Curiae,

IOWA PUBLIC SERVICE COMPANY,
Amicus Curiae,

JERSEY CENTRAL POWER & LIGHT COMPANY,
Amicus Curiae,

MADISON GAS & ELECTRIC COMPANY,
Amicus Curiae,

MINNESOTA POWER & LIGHT COMPANY,
Amicus Curiae,

MONOGAHELA POWER COMPANY,
Amicus Curiae,

MONTAUP ELECTRIC COMPANY,
Amicus Curiae,

NEW ENGLAND POWER COMPANY,
Amicus Curiae,

NEW YORK STATE ELECTRIC & GAS CORPORATION,
Amicus Curiae,

OHIO VALLEY ELECTRIC CORPORATION,
Amicus Curiae,

OKLAHOMA GAS & ELECTRIC COMPANY,
Amicus Curiae,

PACIFIC GAS & ELECTRIC COMPANY,
Amicus Curiae,

PACIFIC POWER & LIGHT COMPANY,
Amicus Curiae,

PENNSYLVANIA POWER & LIGHT COMPANY,
Amicus Curiae,

PHILADELPHIA ELECTRIC COMPANY,
Amicus Curiae,

PUBLIC SERVICE ELECTRIC & GAS COMPANY,
Amicus Curiae,

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Amicus Curiae,

SOUTHERN CALIFORNIA EDISON COMPANY,
Amicus Curiae,

SOUTHERN COMPANY SERVICES, INC.,
Amicus Curiae,

ALABAMA POWER COMPANY,
Amicus Curiae,

GEORGIA POWER COMPANY,
Amicus Curiae,

GULF POWER COMPANY,
Amicus Curiae,

MISSISSIPPI POWER COMPANY,
Amicus Curiae,

TAMPA ELECTRIC COMPANY,
Amicus Curiae,

TEXAS UTILITIES GENERATING COMPANY,
Amicus Curiae,

CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Amicus Curiae,

DETROIT EDISON COMPANY,
Amicus Curiae,

POTOMAC EDISON COMPANY,
Amicus Curiae,

TOLEDO EDISON COMPANY,
Amicus Curiae,

UNION ELECTRIC COMPANY,
Amicus Curiae,

VIRGINIA ELECTRIC POWER COMPANY,
Amicus Curiae,

WEST PENN POWER COMPANY,
Amicus Curiae,

WISCONSIN ELECTRIC POWER COMPANY,
Amicus Curiae,

WISCONSIN POWER & LIGHT COMPANY,
Amicus Curiae,

WISCONSIN PUBLIC SERVICE CORPORATION,
Amicus Curiae,

CHESAPEAKE BAY FOUNDATION,
Amicus Curiae,

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Amicus Curiae,

UNITED STATES OF AMERICA,
Amicus Curiae.

No. 86-1573

THE POTOMAC ELECTRIC POWER COMPANY,
Appellee,

versus

STEPHEN H. SACHS, in his capacity as Attorney General of Maryland; ADELE WILZACK, in her capacity as Secretary of the Maryland Department of Health and Mental Hygiene,
Appellants,

STATE OF NEW YORK,
Amicus Curiae,

STATE OF ALABAMA,
Amicus Curiae,

NIAGARA MOHAWK POWER CORPORATION,
Amicus Curiae,

EDISON ELECTRIC INSTITUTE,
Amicus Curiae,

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Amicus Curiae,

AMERICAN PUBLIC POWER ASSOCIATION,
Amicus Curiae,

AMERICAN ELECTRIC POWER SERVICE CORPORATION,
Amicus Curiae,

APPALACHIAN POWER COMPANY,
Amicus Curiae,

COLUMBUS & SOUTHERN OHIO ELECTRIC COMPANY,
Amicus Curiae,

INDIANA & MICHIGAN ELECTRIC COMPANY,
Amicus Curiae,

OHIO POWER COMPANY,
Amicus Curiae,

ATLANTIC CITY ELECTRIC COMPANY,
Amicus Curiae,

BALTIMORE GAS & ELECTRIC COMPANY,
Amicus Curiae,

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Amicus Curiae,

CENTRAL ILLINOIS LIGHT COMPANY,
Amicus Curiae,

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Amicus Curiae,

CENTRAL & SOUTH WEST SERVICES,
Amicus Curiae,

CINCINNATI GAS & ELECTRIC COMPANY,
Amicus Curiae,

COMMONWEALTH EDISON COMPANY,
Amicus Curiae,

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Amicus Curiae,

DAYTON POWER & LIGHT COMPANY,
Amicus Curiae,

DELMARVA POWER & LIGHT COMPANY,
Amicus Curiae,

DUKE POWER COMPANY,
Amicus Curiae,

DUQUESNE LIGHT COMPANY
Amicus Curiae,

FLORIDA POWER & LIGHT COMPANY,
Amicus Curiae,

HOUSTON LIGHTING & POWER COMPANY,
Amicus Curiae,

ILLINOIS POWER COMPANY,
Amicus Curiae,

INDIANAPOLIS POWER & LIGHT COMPANY,
Amicus Curiae,

IOWA POWER & LIGHT COMPANY,
Amicus Curiae,

IOWA PUBLIC SERVICE COMPANY,
Amicus Curiae,

JERSEY CENTRAL POWER & LIGHT COMPANY,
Amicus Curiae,

MADISON GAS & ELECTRIC COMPANY,
Amicus Curiae,

MINNESOTA POWER & LIGHT COMPANY,
Amicus Curiae,

MONOGAHELA POWER COMPANY,
Amicus Curiae,

MONTAUP ELECTRIC COMPANY,
Amicus Curiae,

NEW ENGLAND POWER COMPANY,
Amicus Curiae,

NEW YORK STATE ELECTRIC & GAS CORPORATION,
Amicus Curiae,

OHIO VALLEY ELECTRIC CORPORATION,
Amicus Curiae,

OKLAHOMA GAS & ELECTRIC COMPANY,
Amicus Curiae,

PACIFIC GAS & ELECTRIC COMPANY,
Amicus Curiae,

PACIFIC POWER & LIGHT COMPANY,
Amicus Curiae,

PENNSYLVANIA POWER & LIGHT COMPANY,
Amicus Curiae,

PHILADELPHIA ELECTRIC COMPANY,
Amicus Curiae,

PUBLIC SERVICE ELECTRIC & GAS COMPANY,
Amicus Curiae,

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Amicus Curiae,

SOUTHERN CALIFORNIA EDISON COMPANY,
Amicus Curiae,

SOUTHERN COMPANY SERVICES, INC.,
Amicus Curiae,

ALABAMA POWER COMPANY,
Amicus Curiae,

GEORGIA POWER COMPANY,
Amicus Curiae,

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Amicus Curiae,

MISSISSIPPI POWER COMPANY,
Amicus Curiae,

TAMPA ELECTRIC COMPANY,
Amicus Curiae,

TEXAS UTILITIES GENERATING COMPANY,
Amicus Curiae,

CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Amicus Curiae,

DETROIT EDISON COMPANY,
Amicus Curiae,

POTOMAC EDISON COMPANY,
Amicus Curiae,

TOLEDO EDISON COMPANY,
Amicus Curiae,

UNION ELECTRIC COMPANY,
Amicus Curiae,

VIRGINIA ELECTRIC POWER COMPANY,
Amicus Curiae,

WEST PENN POWER COMPANY,
Amicus Curiae,

WISCONSIN ELECTRIC POWER COMPANY,
Amicus Curiae,

WISCONSIN POWER & LIGHT COMPANY,
Amicus Curiae,

WISCONSIN PUBLIC SERVICE CORPORATION,
Amicus Curiae,

CHESAPEAKE BAY FOUNDATION,
Amicus Curiae,

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Amicus Curiae,

UNITED STATES OF AMERICA,
Amicus Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Walter E. Black, Jr., United States District Judge.
(CA-86-220-B).

Argued: July 14, 1986 Decided: October 17, 1986

Before PHILLIPS, SPROUSE and CHAPMAN, Circuit Judges.

Arnold M. Weiner (Michael Schatzow; Ethan L. Bauman; Melnicove, Kaufman, Weiner & Smouse on brief); E. Barrett Prettyman, Jr. (Sherwin J. Markman; John C. Keeney, Jr.; David J. Hayes; Hogan & Hartson; Kathleen B. DeWeese, Associate General Counsel, Potomac Electric Power Company, on brief) for Appellant/cross Appellee; Ralph S. Tyler, Assistant Attorney General (Stephen H. Sachs, Atorney General; Richard M. Hall, Michael C. Powell, Kathie A. Stein, Charles R. Taylor, Jr., Assistant Attorneys General on brief) for Appellees/cross Appellants; Karen L. Florini, United States Department of Justice, (F. Henry Habicht, II, Assistant Attorney General; Jacques B. Gelin; Margaret A. Hill; United States Department of Justice; Francis S. Blake, General Counsel; Bruce M. Diamond, Regional Counsel; Terrell Hunt, Associate Enforcement Counsel; Alan H. Carpien; Environmental Protection Agency on brief) for Amicus Curiae United States of America; (Robert Abrams, Attorney General of the State of New York; Lawrence A. Rappoport, Associate Attorney; Nancy Stearns, Assistant Attorney General; John K. Van de

Kamp, Attorney General of State of California; Theodora Berger, Assistant Attorney General; Timothy R. Patterson, Deputy Attorney General; Charles A. Graddick, Attorney General of the State of Alabama; Craig Kneisel, Assistant Attorney General; Joseph I. Lieberman, Attorney General of the State of Connecticut; Kenneth Tedford, Assistant Attorney General on brief) for Amici Curiae State of New York, et al; (Ann Powers, Vice President and General Counsel; Catherine A. Cotter on brief) for Amicus Curiae Chesapeake Bay Foundation, Inc.; (Jacqueline M. Warren; Donald S. Strait, Lawanda Still, Legal Assistant on brief) for Amicus Curiae Natural Resources Defense Council, Inc.; (William L. Kovacs; Henry W. Killeen, III; Donald S. Stefanski; Jaeckle, Fleischmann & Mugel; Joseph F. Cleary, Assistant Secretary and General Attorney, Niagara Mohawk Power Corporation on brief) for Amicus Curiae Niagara Mohawk Power Corporation; (J. Thomas Wolfe; Lynne H. Church on brief) for Amicus Curiae Baltimore Gas and Electric Company; (Toni K. Allen; Mary F. Edgar; Piper & Marbury on brief) for Amici Curiae Edison Electric Institute, et al.

SPROUSE, Circuit Judge:

The Potomac Electric Power Company (PEPCO) appeals from the district court's summary judgment in favor of Steven Sachs, Attorney General of the State of Maryland (Maryland), in PEPCO's declaratory judgment action. PEPCO sought a judgment holding that the federal Toxic Substances Control Act (TSCA)[1] preempts Maryland's hazardous waste laws and regulations,[2] which, among other things, govern the use and disposal of polychlorinated biphenyls (PCBs). PEPCO also sought re-

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[1] 15 U.S.C. § 2601 *et seq.*

[2] Md. Health-Envtl. Code Ann. §§ 7-101 *et seq.*, 9-301 *et seq.* (1982); Md. Admin. Code tit. 10, § 51 (Disposal of Controlled Hazardous Substances).

lief preventing Maryland from enforcing those laws and regulations against PEPCO. The district court denied PEPCO's motion for summary judgment and instead held that TSCA did not preempt the challenged state statutes. On appeal, PEPCO primarily contends that the district court erred because a plain reading of TSCA clearly indicates Congress' intent that the Act preempt any state regulation of PCB disposal.[3]

On cross-appeal, Maryland, of course, agrees with the district court's decision on the merits, but argues that the court erred by refusing to abstain in deference to previously instituted grand jury proceedings. Maryland had initiated the grand jury proceeding to investigate whether PEPCO had violated Maryland's criminal laws and regulations governing hazardous waste disposal. These proceedings were in progress at the time this declaratory judgment action was filed. We agree with Maryland and hold that the district court should have abstained.

PEPCO is the electric utility corporation serving the District of Columbia and some of its suburbs in Maryland and Virginia. Historically, it has used electrical transformers filled with mineral oil. In many of the transformers, the oil was permanently contaminated with PCBs during the manufacturing process. PCBs are highly toxic materials. PEPCO disposed of the obsolete transformers involved here by sale through competitive bids to scrap metal dealers—in this instance to United Rigging and Hauling, Inc. (United Rigging), of Beltsville, Maryland. Pursuant to their contract, United Rigging transported the obsolete transformers from PEPCO's District of Columbia testing facility to United Rigging's

[3] It is of no consequence in light of our decision on abstention, but there is no merit to Maryland's argument that the district court lacked jurisdiction. *See Lawrence County v. Lead-Deadwood School District*, —— U.S. ——, 105 S. Ct. 695, 698 n.6 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

salvage yard in Maryland where the scrapping activities were carried out.

In 1985, Maryland's Waste Management Administration determined that United Rigging's salvage yard and a nearby creek were contaminated with PCBs. Following that determination, PEPCO and United Rigging entered into an Administrative Consent Order with the State of Maryland and the Environmental Protection Agency to conduct a cleanup of the site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.[4] In April of 1985, the Attorney General of Maryland commenced a grand jury criminal investigation of PEPCO's and United Rigging's roles in scrapping the transformers and disposing of the hazardous material. It appears the grand jury was on the verge of indicting PEPCO.[5]

Against this background of state activity, PEPCO brought this declaratory judgment action in the United States District Court for the District of Maryland, seeking a declaration that provisions of TSCA preempt Maryland's laws and regulations on hazardous waste disposal.[6] PEPCO filed a motion for summary judgment and the district court, ruling against PEPCO, held that TSCA does not preempt Maryland's hazardous waste disposal laws and regulations. PEPCO appeals from this decision and Maryland cross-appeals from the district court's re-

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[4] 42 U.S.C. § 9601 *et seq.*

[5] In its opinion, the district court concluded that "an indictment of PEPCO for alleged responsibility for or participation in the United Rigging contamination is imminent." United Rigging has since entered into a plea agreement with the Attorney General of Maryland for violations of the Health-Environment Article of the Maryland Code.

[6] PEPCO argues that to avoid preemption of its PCB disposal laws, a state must apply for and receive an exemption under 15 U.S.C. § 2617(b); and Maryland did neither.

fusal to abstain. Because we hold that abstention is appropriate in this case, we do not address the merits of PEPCO's preemption claim.

The district court ruled in response to Maryland's motion to dismiss that abstention under *Younger v. Harris*, 401 U.S. 37 (1971), was inappropriate. It analyzed the *Younger* doctrine and concluded that it did not apply to state grand jury proceedings because there was no adequate opportunity for PEPCO to raise its federal claim of preemption before the grand jury. The district court viewed the grand jury investigation as a proceeding that was separate from the possible resulting criminal prosecution. It noted that since there was no certainty of indictment, it was possible that PEPCO would never be able to present the preemption claim in state court. Further, the court reasoned that, even if indicted, there was no indication of how long PEPCO would have to wait for a state forum in which to present its claim of federal preemption. We cannot agree with the conclusion the district court reached from this reasoning.

Younger v. Harris set forth the established "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 401 U.S. at 41 (footnote omitted). Specifically, "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury." *Samuels v. Mackell*, 401 U.S. 66, 69 (1971). A companion case to *Younger*, *Samuels v. Mackell* held that declaratory relief should also be denied where an injunction would be improper under *Younger*. *Id.* at 73. The Court, however, recognized exceptions to abstention for prosecutions brought in bad faith or for harassment purposes or in other extraordinary circumstances. *Younger v. Harris*, 401 U.S. at 53.

The Supreme Court has never addressed the issue of whether *Younger* applies to state grand jury proceedings. It has ruled, however, that the doctrine applies to quasi-criminal proceedings such as nuisance actions, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); to state civil enforcement activities such as the recovery of fraudulently obtained welfare payments, *Trainor v. Hernandez*, 431 U.S. 434 (1977); child custody actions, *Moore v. Sims*, 442 U.S. 415 (1979); and contempt proceedings, *Juidice v. Vail*, 430 U.S. 327 (1977); and to state administrative proceedings in which important state interests are involved and an adequate opportunity exists to present federal or constitutional challenges to the state action, *Ohio Civil Rights Commission v. Dayton Christian Schools*, 54 U.S.L.W. 4860 (U.S. June 24, 1986); *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982); *Gibson v. Berryhill*, 411 U.S. 564 (1973).

The fundamental principles underlying *Younger* and its progeny of decisions are equity, comity and federalism. A "basic doctrine of equity jurisprudence [is] that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger*, 401 U.S. at 43-44. The notion of comity is one of federal courts having the "proper respect for state functions," which reinforces the policy of noninterference in state criminal proceedings by courts of equity. *Id.* at 44. Federalism represents

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

These principles encompass the belief that state courts are as capable as federal courts of deciding federal or constitutional issues; therefore, all state and federal claims should be addressed in the pending state proceeding. *See Moore v. Sims*, 442 U.S. at 320; *Huffman v. Pursue, Ltd.*, 420 U.S. at 611. *See also Lynch v. Snepp*, 472 F.2d 769, 774 (4th Cir. 1973) ("It should never be forgotten that the Constitution literally calls state judges by name . . . and puts upon them the obligation to apply the supreme Law of the Land.").[7] These classic precepts, we think, apply to a state quasi-judicial action taken within its grand jury system with as much or more force as they apply to the state administrative, civil, and quasi-criminal involved in in *Dayton Christian Schools*, *Moore v. Sims*, *Trainor v. Hernandez*, and *Huffman v. Pursue, Ltd.*[8] A common thread to these de-

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[7] While the Supreme Court has never analyzed the treatment of a preemption claim in applying the *Younger* doctrine, it appears to us that the same logic requiring abstention when there is a constitutional challenge to a state criminal statute applies to litigation where there is a claim of federal preemption due to a congressional enactment. *See Samuels v. Mackell*, 401 U.S. 66 (1971) (alternative claims of federal preemption and unconstitutionality of state criminal anarchy law not distinguished). A state's interest in enforcing its criminal statutes remains undiminished until a statute is declared unconstitutional. Likewise, its enforcement interest remains undiminished until the statute is declared preempted or invalid for any other reason. It would strike us as anomalous to hold that a state court may decide federal constitutional issues but is unqualified or inhibited from deciding preemption issues.

[8] In Maryland, grand juries operate under the auspices of the judicial branch. "Grand juries operate under the control of the court which convenes them," *Duckett v. Touhey*, 36 Md. App. 238, 242, 373 A.2d 323, 325 (1977), with the "single view that the accused may be brought to trial in the court whereof the grand jury is a part . . . ." *In re Report of Grand Jury*, 152 Md. 616, 622, 137 A. 370, 372 (1927) (setting out detailed history of grand juries as well as their function and purpose). Importantly, the Supreme Court of the United States has stated that *federal* grand

cisions is the requirement that the federal plaintiff have an opportunity to present the federal claim in the state proceedings.[9]

The pivotal question then is whether PEPCO has an adequate opportunity to present its preemption claim within the state grand jury proceedings. The Supreme Court has recently held in the context of state administrative proceedings that an adequate opportunity exists when the federal plaintiff can present its claim on judicial review of the state administrative action or order. In *Middlesex County Ethics Committee v. Garden State Bar Association*, the Court held that abstention was proper where an attorney subject to disciplinary action by the state ethics committee could present his constitutional challenge to the action on review by the New Jersey Supreme Court. 457 U.S. 423 (1982). In a case

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jury proceedings are judicial in nature. In *Cobbledick v. United States*, 309 U.S. 323 (1940), the Court stated:

> The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it is attached and to which, from time to time, it reports its findings. The proceeding before a grand jury constitutes "a judicial inquiry" of the most ancient lineage.

Id. at 327, *quoting Hale v. Henkel*, 201 U.S. 43, 66 (1906). *See Levine v. United States*, 362 U.S. 610, 617 (1960) ("The grand jury is an arm of the court and its in camera proceedings constitute 'a judicial inquiry.' ").

[9] In contrast, the Supreme Court held *Younger* inapplicable in two instances because the federal plaintiff could not present its claim in the state proceedings. In *Gibson v. Berryhill*, 411 U.S. 564 (1973), the Court held that the inherent bias of the state optometry board effectively denied an opportunity to present the federal claim. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Supreme Court held that *Younger* did not bar a federal suit on the legality of pretrial detention without a hearing to determine probable cause because the claim could not be raised in defense at the criminal trial. *Id.* at 108 n.9.

decided subsequent to the district court's ruling in this case, the Court stated, in response to a claim that the Ohio Civil Rights Commission could not consider constitutional claims, that "in any event, it is sufficient under *Middlesex*, that constitutional claims may be raised in state court judicial review of the administrative proceeding." *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 54 U.S.L.W. at 4863. These cases demonstrate that not only is the immediate proceeding relevant in determining whether there is an opportunity to present a federal claim, but subsequent state judicial proceedings in which the claim can be raised are also relevant. Grand jury investigation and indictment initiate a criminal prosecution in Maryland's system of criminal enforcement. If indicted, PEPCO can present its claim of federal preemption by TSCA as a defense to the criminal prosecution, and therefore has an adequate opportunity to present the claim in the ongoing proceedings.[10]

This court has previously decided in another context that the *Younger* doctrine applies to state-initiated grand jury proceedings. *See Craig v. Barney*, 678 F.2d 1200 (4th Cir.), *cert. denied*, 459 U.S. 860 (1982). In *Craig*, we dealt with the validity of a subpoena while here PEPCO attacks the validity of the entire grand jury process as it relates to its alleged environmental violations. We think nevertheless that the reasoning of *Craig* governs our decision in this case and that *Younger* requires abstention. The grand jury, although separate, is

[10] Contrary to PEPCO's contention, the fact that PEPCO cannot present its claim immediately does not establish that it has no adequate opportunity to present the preemption claim. In *Moore v. Sims*, the Court addressed a similar argument concerning delay in holding a requested hearing and ruled that the argument was indistinguishable from "conventional claims of bad faith," and the Court could not "agree that the conduct of the state authorities in this case evinces bad faith." 442 U.S. at 432. Here, there is not even an allegation of bad faith.

an integral part of state criminal enforcement proceedings and here, as in *Craig*, PEPCO will have an adequate opportunity to present its federal claim within that ongoing state system. The district court, therefore, should have abstained.

In view of our abstention ruling, we do not address the merits of PEPCO's preemption claim. On remand, PEPCO's action must be dismissed and its claims pursued in Maryland courts. *Gibson v. Berryhill*, 411 U.S. at 577. The judgment of the district court is, therefore, reversed and remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MARYLAND

Case Number B86-220

POTOMAC ELECTRIC POWER COMPANY,
Plaintiff,

VS.

STEPHEN H. SACHS, *et al.*,
Defendants.

March 27, 1986

TRANSCRIPT OF RECORDED PROCEEDINGS

BEFORE THE HONORABLE WALTER E. BLACK, JR.

Appearances:

For the Plaintiff:

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For the Defendant:

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Baltimore, MD 21202
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[2] THE COURT: Good afternoon.

THE CLERK: The matter now pending before the Court is Civil Docket Number B86-220 for Potomac Electric Power Company vs. Stephen H. Sachs, et al. Counsels for the plaintiff are Arnold M. Weiner, E. Barret Prettyman, Jr. and David J. Hayes. Counsels for the defendants are Michael C. Powell and Ralph S. Tyler.

This matter now comes before the Court for a hearing on motion of plaintiff for summary judgment.

THE COURT: I think at the outset, Counsel, let me take care of my unfinished business, which is to render an informal oral opinion on the matters raised in the hearings two weeks ago, reserving the right, if it is transcribed for any reason, to edit that opinion, without in any way changing the results or the essential meaning.

This is declaratory judgment action brought by Potomac Electric Power Company, referred to as PEPCO, against the Attorney General of Maryland. PEPCO, who is currently being investigated by the State Court Grand Jury for possible violation of State environmental laws, seeks to have the Federal Court declare that the Toxic Substance Control Act, referred to as TOSCA, 15 U.S.C., Sections 2601 and following, preempts State law.

Of particular focus in this case is the regulation of polychlorinated biphenyls, PCB's, a highly toxic substance [3] found in electrical transformers used by the plaintiff.

Pending before the Court is the defendant's motion to dismiss the case, Paper Number 9, pursuant to Rule 12 (D) (1) of the Federal Rules of Civil Procedure. The defendants present three arguments why this Court lacks subject matter jurisdiction over the case.

First, the plaintiff's claims do not present a Federal question. Second, no actual case or controversy exists between the parties; and third, that the principles of federalism and comity compel Federal Court abstention under *Younger v. Harris*, 401 U.S. 37, 1971.

The parties have submitted memoranda in support of their respective positions and the Court had the benefit

of oral argument on Thursday, March 13, 1986. After careful consideration of the arguments presented, the Court has concluded that the motion must be denied for reasons the Court will discuss. This Court does, in fact, have subject matter jurisdiction over this action and abstention is inappropriate.

First, it should be pointed out that the party asserting jurisdiction has the burden of proof, see *Thompson v. Gaskill*, 315 U.S. 442 at 446; 1942; *Gibbs v. Buck*, 307 U.S. 66 at 72, 1939; *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178 at 188 and 9, 1936; *Hair v. Family Publications Service, Inc.*, 342 F.Supp., 678 at [4] 682, District of Maryland, 1972.

Now, the claim is based upon the Court's Federal question of jurisdiction. The plaintiff must prove the claim is, in fact, based upon Federal Law and that the claim is not frivolous, Wright and Miller Federal Practice and Procedure, Civil Section Number 1350 at 556 and Note 93, citing *Baker v. Carr*, 369 U.S. 186, 1962.

The Court is persuaded that the plaintiff has met its burden with respect to all three of the issues raised by the defendants. First as to the Federal question, under 28 United States Code, Section 1331, this Court has original jurisdiction over any civil action arising under the Constitution and Laws of the United States. The courts traditionally have required that the Federal question appear on the face of a well-pleaded complaint; and not as an anticipated defense to the claim. *Louisville and Nashville Railroad Company v. Mottley*, 211 U.S. 149, 1980. See generally Wright and Miller, Civil Section 3566.

PEPCO has, in fact, invoked Federal Law, TOSCA, on the face of the complaint; and at first blush, that fact alone would appear to satisfy the jurisdictional requirement. The defendants argue, however, that PEPCO's claim is, in fact, only a defense to a possible criminal action the Attorney General may bring against it. That such an anticipated defense is insufficient to satisfy the [5] requirements of Federal question jurisdiction.

While it is true that success on the part of the plaintiff in this declaratory judgment action could have the effect of borrowing a State criminal prosecution, it does not follow that Federal question jurisdiction is lacking in this Court. Indeed, it appears that the plaintiff has followed precisely the procedures mandated by the Supreme Court for bringing declaratory judgment actions in Federal Court.

The hazy distinction between a Federal claim and an anticipated Federal defense was recently addressed by the Supreme Court in a series of cases decided in 1983 and 1985. In one, *Franchise Tax Board v. Construction Laborers' Vacation Trust for Southern California*, 463 U.S. 1, 1983, the Supreme Court held that the Federal Court lacked jurisdiction to hear a case where the State was the plaintiff in a State Court action, and claimed that the State Law in question was not preempted by Federal Law.

The defendants removed the case to Federal Court on the basis that the preemption issue created Federal question jurisdiction. The Supreme Court reversed, holding that the Federal Court should look only at the State complaint in determining whether Federal question jurisdiction exists. The same day, the Supreme Court decided *Shaw v. Delta Airlines*, 463 U.S. 85, 1983, and held that where the plaintiffs in Federal Court sought injunctive and declaratory [6] relief from State regulation, on grounds of Federal preemption, a Federal question was presented.

The distinction between the two cases is that in *Franchise Tax Board*, it was the State that was attempting to show that its laws were not preempted; in *Shaw*, the Federal plaintiffs sought to prove that Federal Law preempted the State Law being applied against them. Indeed, Justice Blackmun, writing for the Court in *Shaw* distinguished the cases on precisely these grounds by citing *Shaw*, 463 U.S. at 986, Note 14, and the Court also

refers to Wright and Miller, Section 3566 at Pages 99 to 101.

Clearly, PEPCO more closely resembles the plaintiffs in *Shaw* than in *Franchise Tax Board*, a case upon which the defendants heavily relied. Moreover, subsequent cases from the Supreme Court further support the conclusion that there is Federal question jurisdiction here. For example, in *Arcudi v. Stone and Webster Engineering Corporation*, 463 U.S. 1220, 1983, the Court summarily affirmed the judgment of the Second Circuit in *Stone and Webster Engineering Corporation v. Ilsley*, 690 F.2d, 323, Second Circuit 1982, which had found that a Federal preemption challenge to a State Statute was within the Court's Federal question jurisdiction.

The Supreme Court reaffirmed this principle in *Lawrence County vs. Lead Deadwood School District*, 105 [7] S.Ct., 695, 1985, where the Court rejected the Eighth Circuit's conclusion that a Federal preemption challenge to a State Statute did not state a Federal question. I'm referring to Page 698, Note 6.

Moreover, in a case similar on its facts to this case, the Fifth Circuit had little difficulty in finding Federal question jurisdiction in a case where the plaintiff claimed that TOSCA preempted State Law, *Rollins Environmental Service v. Parish of St. James*, 775 F.2d, 627 at 631, Fifth Circuit, 1985.

The Court recognizes that there is some authority in the Fourth Circuit that arguably supports the defendant's position, specifically in *City National Bank v. Edmisten*, 681 F.2d, 942, Fourth Circuit, 1982. The Court vacated the declaratory judgment of the District Court that certain banking procedures did not violate state usury laws. The Court held that the claim did not arise under Federal Law, because the complaint involved only State Law. The case is clearly distinguishable on the basis of the fact that the complaint did not involve Federal Law, whereas PEPCO's complaint does.

Moreover, the *Edmisten* decision came before the Supreme Court decision in *Shaw, Stone and Webster,* and *Lawrence County,* and the Court is persuaded that any ambiguity created by *Edmisten* is resolved by those later [8] authorities.

Accordingly, the Court finds that by bringing a claim that specifically invokes the preemption provision in Federal Statute, the plaintiff has met its burden of proving Federal question jurisdiction. Indeed, where the very question at issue is whether or not Congress intended certain provisions of a Federal Statute to preempt State Law, it seems both logical and legally correct that the Federal District Court is the appropriate forum in which to bring the case.

Second, as to the case or controversy. The defendants assert that PEPCO has not alleged a case or controversy within the meaning of Article III of the United States Constitution. Specifically, the defendants argue that the State's investigation of PEPCO does not constitute an actual controversy and that the threat of enforcement is not sufficiently real to satisfy the requirements of Article III. This assertion need not detain us long, particularly in light of the defendant's concession at oral argument, that the threat of enforcement is now more acute than at the time the Motion to Dismiss was filed.

This fact is reflected in the defendant's reply brief, where in addressing the abstention issue, the defendants spelled out in detail how imminent a criminal prosecution of PEPCO had become. Indeed, it is somewhat [9] inconsistent to argue that the present investigation of PEPCO is a pending State criminal proceeding for abstention purposes, but is not a case or controversy under Article III.

In *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 1979, the Supreme Court stated that a case or controversy under Article III must embody a dispute definite and concrete, not hypothetical or abstract, being a quote from Page 298. The issue of how

concrete a dispute must be in order to meet this test is not entirely clear, but the Court is persuaded that the dispute between PEPCO and the Maryland Regulatory Agency is sufficiently immediate to meet the test. The State has been rating PEPCO for several years and has conducted a thorough investigation into the company's handling of transformers. There is nothing hypothetical or abstract about the possibility of indictment in this case.

Several lower court decisions support this conclusion. For example, in *Hughes v. Christophony*, 486 F.Supp. 541, District of Maryland, 1980, the owners of a restaurant challenged an ordinance prohibiting topless dancing where food or alcohol was served. The Court determined that where law enforcement authorities had made arrests on enforcement visits, the threat of prosecution was sufficiently real to provide the plaintiffs with standing to bring the claim.

In addition, the Eighth Circuit addressed itself to [10] the case or controversy's requirement in the environmental context in *Caldwell v. Girley Refining Company*, 755 F.2d 645, Eighth Circuit, 1985. In that case, Federal agencies have asserted the plaintiffs liability for certain hazardous waste spills, but had not initiated any prosecution. *Caldwell* sought declaratory relief and the Court found that the threat of prosecution was sufficiently real to satisfy the case or controversy requirement. A quote, "a plaintiff need not always wait the actual commencement in enforcement proceedings to challenge the authority under which those proceedings would be brought", at Page 650.

The same reasoning applies here. The Court finds that the disagreement between PEPCO and the State of Maryland has advanced close enough to the indictment stage to satisfy the case or controversy requirement of Article III.

Third, the *Younger* abstention. Finally, the defendants assert that the Grand Jury Investigation of PEPCO

constitutes ongoing State proceedings to which this Court should defer under the doctrine of *Younger v. Harris*, 401 U.S. 37, 1971. While the *Younger* decision itself applied to a State criminal prosecution already in progress, the doctrine has been expanded to apply to civil and administrative proceedings in certain contexts. See, for example, *Moore v. Sims*, 442 U.S. 415, 1979; *Hoffman v. Pursue, Limited*, 420 U.S. 592, 1975; *Turner v. Hernandez*, 431 [11] U.S. 434, 1977.

In its most recent consideration of the scope of the *Younger* doctrine, the Supreme Court listed three considerations Federal Court should evaluate in determining whether abstention is appropriate in light of the State proceedings.

First, there must be an ongoing State judicial proceeding. Second, the proceedings must implicate important State interest; and third, there must be an adequate opportunity in the State proceedings to raise the Federal claims. *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 at 432, 1982.

Of these three factors, it is clear that the third is the most important for our purposes in this case. As the Court indicated at oral argument, there is a surprising dirth of case law on the issue of whether or not the *Younger* doctrine applies to State Grand Jury proceedings. The parties have brought to the Court's attention, however, several cases where the issue was addressed, though apparently not conclusively resolved.

In one, *Craig v. Barney*, 678 F.2d 1200, Fourth Circuit, cert. denied, 459 U.S. 860, 1982, the managers of adult bookstores sought to enjoin Virginia Grand Jury proceedings where no indictment had been filed, and where the Grand Jury lacked the power to indict, the Court found that [12] *Younger* abstention was appropriate because of the matter of State Law, that Federal plaintiffs would have an adequate opportunity to raise their Federal claims in the State proceeding through appropriate legal procedures, such as a contempt hearing.

The Court went on to say, however, that "Federal Court should not dismiss unless the State proceeding has reached a stage that assures the Federal plaintiff an opportunity to present its Constitutional defenses at some point during the ongoing proceeding." That's a quote from Page 1201.

In a case from another jurisdiction, *Sovereign News Company v. Falke*, 448 F. Supp. 306, Northern District of Ohio, 1977, the Court used similar language in determining whether the *Younger* doctrine should apply to State Grand Jury actions. In that case, the Federal plaintiffs sought to enjoin State Prosecutors from introducing into evidence before the Grand Jury certain materials allegedly seized in violation of the plaintiff's Fourth Amendment rights. The Court found that the *Younger* abstention did apply, because in the context of that case, the plaintiffs had an adequate opportunity to raise their typical Federal claim.

The Court reasoned that the defendant would either not be indicted by the Grand Jury, or could immediately raise the Federal defense in a criminal prosecution. Referring to [13] page 359.

This Court cannot agree with that analysis in determining whether or not the Federal plaintiff has an adequate opportunity to raise the Federal claim, this Court must look not to what the proceedings might become, but to what they are now. It is clear that PEPCO has no present opportunity to raise its Federal concerns in the Grand Jury proceedings. As noted in *Middlesex* and also in *Gibson v. Berryhill*, 411 U.S. 546, 1973, if there is no opportunity to raise the Federal issue in the State proceedings, then the *Younger* abstention is inappropriate.

Moreover, the Supreme Court has stated clearly that where a State criminal case has not yet begun, that is, an indictment has not yet been filed, considerations of Federalism are not controlling. *Steffel v. Thompson*, 415

U.S. 452, 1974, citing *Perez v. Ledesma*, 401 U.S. 82, 1971, are the concurring opinion of Justice Brennan.

This line of authority seems to run counter to the lower court holdings in *Craig* and *Sovereign News*. The Court is persuaded, however, that *Steffel* and *Perez* control this case, and that because the State Grand Jury proceeding has not yet reached the stage where PEPCO can raise its Federal claim, the *Younger* principle should not apply.

The issue turns in part on whether one considers State Grand Jury proceedings as a separate process or as part [14] of a criminal case. The defendant correctly points out that if PEPCO ever is indicted, it would then be able to raise its Federal defense in State Court. However, that relief is inadequate to protect PEPCO's asserted Federal rights at the present time, as noted in *Berryhill* at Page 577.

The availability of a subsequent forum to raise the Federal claim is an inadequate basis upon which to invoke Federal Court abstention. The Court is thus persuaded that State Grand Jury proceedings must be viewed as separate from the actual criminal prosecution. There is no certainty that the Grand Jury will actually return an indictment, nor is there any indication of how long PEPCO would have to wait before it had its forum to raise the Federal defense.

Under such circumstances, it would be harsh, indeed, to foreclose the opportunity to bring the preemption challenge to Federal Court prior to indictment. PEPCO has no opportunity at all to raise its Federal claim in the State Grand Jury proceedings, principles of abstention under *Younger*, therefore, do not apply.

In conclusion, the Court finds that the defendants' Motion to Dismiss must be denied. A Federal question is presented on the face of the complaint, an actual controversy exists between the parties sufficient to satisfy the case or controversy requirement, and Federal Court abstention under *Younger v. Harris* would be inappropri-

ate on the facts of this [15] case. As a result, this Court has jurisdiction to proceed in this case.

While the issues presented by the defendant, merited serious consideration, the Court is entirely persuaded that the Federal District Court is the appropriate forum in which this claim should be heard. At issue is a Federal Statute containing an express preemption provision. It seems far more efficient and fair to decide in this forum the issue of what Congress intended, than to require the litigants to defend a criminal prosecution at great length and then hope for Supreme Court review on a fortiori. The plaintiff has a Federal claim and having filed this declaratory action before any indictment was filed in State Court, it has the right to have the matter decided before this tribunal.

The motion is denied, and I have entered a formal order consistent with this opinion. Bob, have Counsel been furnished with a copy of the order?

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. B-86-220

THE POTOMAC ELECTRIC POWER COMPANY

v.

STEPHEN H. SACHS, in his capacity as Attorney General of Maryland, and ADELE WILZACK, in her capacity as Secretary of the Maryland Department of Health and Mental Hygiene

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Filed: April 16, 1986.

Arnold M. Weiner, Michael Schatzow, Ethan L. Bauman, and Melnicove, Kaufman, Weiner & Smouse, P.A., of Baltimore, Maryland; E. Barrett Prettyman, Jr., Sherwin J. Markman, John C. Keeney, Jr., David J. Hayes, and Messrs. Hogan & Hartson, of Washington, D.C.; and Kathleen B. DeWeese, Assistant General Counsel, of Washington, D.C.: for plaintiff, The Potomac Electric Power Company.

Stephen H. Sachs, Attorney General of Maryland, Michael C. Powell, Richard M. Hall, Kathie A. Stein, Charles R. Taylor, and Ralph S. Tyler, Assistant Attorneys General of Maryland: for defendants, Stephen H. Sachs, in his capacity as Attorney General of Maryland, and Adele Wilzack, in her capacity as Secretary of the Maryland Department of Health and Mental Hygiene.

Black, District Judge.

This action for declaratory judgment presents the Court with a narrow legal question of statutory interpre-

tation. Does the federal Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (TOSCA), preempt Maryland's regulatory provisions governing the disposal of polychlorinated biphenyls (PCBs)?

The plaintiff, Potomac Electric Power Company (PEPCO) seeks to avoid a possible state criminal enforcement action by means of a declaratory judgment that all state regulations relating to PCBs are preempted by TOSCA. The defendants, Stephen H. Sachs, Attorney General of Maryland, and Adele Wilzack, Secretary of the Maryland Department of Health and Mental Hygiene, argue that Maryland's regulations governing disposal of PCBs are not subject to preemption in light of the specific exceptions in the preemption provision of TOSCA.

The matter is before the Court on the plaintiff's Motion for Summary Judgment.

I. BACKGROUND

Polychlorinated biphenyls are chemical substances which have been manufactured and used commercially for several decades. Due to their chemical stability, fire resistance, and electrical resistance properties, they have frequently been used in electrical transformers and capacitors. In the past, PEPCO used electrical transformers containing this substance.

PCBs, however, are extremely toxic.

> "Epidemiological data and experiments on laboratory animals indicate that exposure to PCBs pose carcinogenic and other risks to humans. Experimental animals developed tumors after eating diets that included concentrations of PCBs as low as 100 parts per million (ppm). Experiments on monkeys indicate that diets with PCB concentrations of less than ten ppm reduce fertility and cause still births and birth defects. Other data show that PCBs may ad-

> versely affect enzyme production, thereby interfering with the treatment of diseases in humans."
>
> *Environmental Defense Fund v. Environmental Protection Agency*, 636 F.2d 1267, 1270 (D.C. Cir. 1980).

Moreover, PCBs accumulate in fish and other aquatic organisms and are virtually indestructible in the environment. Affidavit, of Ronald Nelson, attached to Defendants' Memorandum in support of Motion to Dismiss, at 2.

Both Congress and the state of Maryland have responded to the grave dangers presented by PCBs. At the federal level, Congress passed TOSCA, which allows the administrator of the Environmental Protection Agency (EPA) to regulate virtually all aspects of PCB manufacture, use and disposal. *See* 15 U.S.C. § 2605(e) (providing a separate provision for PCBs). Indeed, the legislative history of TOSCA indicates that PCBs were a special source of concern to Congress at the time of the passage of the statute. *See* comments of Representative Dingell, explaining Congress' attention to the immediate dangers posed by PCBs, Defendants' Opposition to plaintiff's Motion for Summary Judgment at 21. At the state level, Maryland regulates PCBs as a hazardous waste under the state's waste management program. By tracking PCBs from "cradle to grave," the state can detect and respond to PCB problems, incidents and spills in the state. Nelson Affidavit, *supra*, at 3.

The present controversy arises out of PCB contamination discovered at a Beltsville, Maryland site used by the United Rigging and Hauling Company (United Rigging) as a salvage yard for electrical transformers. State authorities discovered PCB concentrations in the soil as high as 128,000 parts per million and found that contaminated runoff was entering a nearby creek. Pursuant to their authority under the Comprehensive Environmental Response, Compensation, and Liability Act of

1980 (CERCLA or Superfund), 42 U.S.C. § 9601 *et seq.*, state and federal authorities determined that the situation at the United Rigging site posed an imminent and substantial endangerment to public health, welfare, or the environment. PEPCO, whose transformers were found at the site, along with United Rigging, entered into an administrative consent order with state authorities and the EPA to conduct the Superfund cleanup. The cleanup activities resulted in the removal of 10,562 tons of PCB-contaminated soil and 787 electrical transformers. Nelson Affidavit, *supra*, at 5.

In May, 1985, a Prince George's County grand jury began a criminal investigation of the contamination at the United Rigging site. PEPCO has been one of the subjects of that investigation, which has not yet led to any indictments. There is little question from the record, however, that an indictment of PEPCO for alleged responsibility for or participation in the United Rigging contamination is imminent. *See* Defendant's Reply Memorandum in support of Motion to Dismiss at 11-13 n.10 (providing details of the intention of the Attorney General's Office to prosecute).

PEPCO brought this suit in federal court in an apparent attempt to foreclose the possibility of a state criminal prosecution. Its argument, in sum, is that TOSCA expressly preempts any state efforts to regulate PCBs, including disposal, and that the state therefore lacks the authority to regulate the substances or to indict a party for mishandling them.

The Court has previously denied the defendants' Motion to Dismiss, or for Summary Judgment, Based Upon Lack of Jurisdiction, or for Stay. The Court found that PEPCO's complaint established federal question jurisdiction under *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983), that the facts presented a live case or controversy, and that federal court abstention under *Younger*

v. Harris, 401 U.S. 37 (1971), was inappropriate.[1] Accordingly, the parties proceeded to the merits of the plaintiff's Motion for Summary Judgment, which was fully briefed and presented at oral argument on March 27, 1986.

After full consideration of the arguments presented, the Court is persuaded that the plaintiff's motion must be denied and declaratory judgment entered in favor of the defendants. As discussed below, the matter is ripe for adjudication on summary judgment, and the Court has determined that the Maryland regulations governing disposal of PCBs are not preempted by TOSCA.

II. SUMMARY JUDGMENT

Under Rule 56 of the Federal Rules of Civil Procedure, a motion for summary judgment can only be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). The burden is on the moving party to demonstrate clearly that there is no genuine issue of fact and any doubt as to the existence of such an issue is resolved against him. *Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co.*, 381 F.2d 245, 249 (4th Cir. 1967). This burden can be a heavy one; the standard for passing on motions for summary judgment is strict. *Clarke v. Montgomery Ward & Co.*, 298 F.2d 346, 348 (4th Cir. 1962). If interpretations of the facts of a case differ, summary judgment is improper. *Morrison v. Nissan Motor Co., Ltd.*, 601

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[1] At oral argument on the motion for summary judgment, the defendants moved to file an immediate appeal of this Court's ruling on these issues, pursuant to 28 U.S.C. § 1292(b). In light of the dispositive ruling of this opinion, that motion will be denied as moot, and the parties will be free to argue the jurisdictional issues, as well as the merits, on appeal.

F.2d 139, 141 (4th Cir. 1979). *See also Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985), where the court determined that summary judgment is proper only when "it is perfectly clear that there are no [factual] issues in the case."

The Court has determined that the narrow legal issues presented by this case are ripe for determination on summary judgment. The primary task before the Court is to determine the intent of Congress when it enacted the preemption provision of TOCSA. None of the facts related to Congress' activities are in dispute. While the parties clearly interpret the legislative history quite differently, the record is complete, and proceeding to trial would do nothing to further illuminate what Congress intended. There are obviously substantial issues of fact relating to the actions which created the contamination at the United Rigging site, but those issues are not before the Court. Rather, the focus of this Court's attention is solely on the preemption provision of TOSCA, 15 U.S.C. § 2617, and the exceptions contained in it. On those issues, there is no dispute of fact.[2] Moreover, as one court has stated, "[q]uestions of statutory construction and legislative history traditionally present legal questions properly resolved by summary judgment." *Union Pacific Land Resources Corp. v. Moench Investment Co.*, 696 F.2d 88, 93 n.5 (10th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983).

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[2] A possible exception—where a dispute of fact might exist—is in the arguments related to the identity or lack of identity between the Maryland regulations and the federal regulations under the first of the three listed exceptions in § 2617, § 2617(a)(2)(B)(i). If the Court were to rule on that issue, more facts would be needed, in order to examine the regulations item by item. The Court, however, does not reach that issue, having concluded that the State must prevail on a separate dispositive issue. The factual issues of the identity of the regulations, therefore, are not in any sense material to the Court's ruling.

III. PREEMPTION UNDER TOSCA

"It is well-established that within constitutional limits Congress may preempt state authority by so stating in express terms." *Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 203 (1983), citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the absence of an express preemption provision, Congress' intent to preempt state law may be found from a pervasive scheme of federal regulation that leaves the states no room to supplement the federal requirements or from a regulatory scheme in which the federal interest is dominant. Even where Congress does not entirely displace state regulation, state law is preempted to the extent that it conflicts with federal law or stands as an obstacle to the accomplishment of the purposes and objectives of Congress. *Pacific Gas & Electric*, 461 U.S. at 203-04. It should be noted, however, that in certain areas traditionally left to the historic police powers of the State, preemption will be found only if the clear and manifest purpose of Congress is to preempt. *Jones v. Rath Packing*, 430 U.S. at 525; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In TOSCA, Congress was explicit in addressing the preemption issue by including § 2617. It determined that federal regulations under TOSCA should preempt certain areas of state regulation, but not in situations specifically excepted in the statute. In effect, by including the exceptions to preemption, Congress left the states a limited role to play in the regulation of toxic substances. The only issue presented here is whether Maryland's PCB disposal regulations come within any of those exceptions.

The preemption section of TOSCA provides in pertinent part as follows:

§ 2617. Preemption

(a) Effect on State Law. (1) Except as provided in paragraph (2), nothing in this chapter shall affect the authority of any State or political subdivision of a State to establish or continue in effect regulation of any chemical substance, mixture, or article containing a chemical substance or mixture.

(2) Except as provided in subsection (b) of this section—

* * *

(B) if the Administrator prescribes a rule or order under section 2604 or 2605 of this title (other than a rule imposing a requirement described in subsection (a)(6) of section 2605 of this title) which is applicable to a chemical substance or mixture, and which is designed to protect against a risk of injury to health or the environment associated with such substance or mixture, no State or political subdivision of a State may, after the effective date of such requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture, or an article containing such substance or mixture, and which is designed to protect against such risk unless such requirement (i) is identical to the requirement prescribed by the Administrator, (ii) is adopted under the authority of the Clean Air Act or any other Federal law, or (iii) prohibits the use of such substance or mixture in such State or political subdivision (other than its use in the manufacture or processing of other substances or mixtures).

The statutory scheme starts with the premise that no state regulation is preempted until the Administrator promulgates a rule governing that substance. Then, once the Administrator promulgates such a rule, state law is preempted unless it comes within the exceptions listed

in the statute, of which there are four. The first is contained in the parenthetical clause stating "(other than a rule imposing a requirement described in subsection (a)(6) of section 2605 of this title)"; the remaining three are listed at the end of § 2617(a)(2)(B).

As explained below, the Court finds that the Maryland rules governing disposal of PCBs fall within the parenthetical exception and are therefore not preempted by the federal disposal regulations. It is therefore unnecessary to reach the issues presented by the remaining three exceptions.

IV. THE PARENTHETICAL EXCEPTION OF § 2617(a)(2)(B)

A. *The Statutory Language.*

The defendants and *amici*[3] argue that the plain language of the statute shows that the parenthetical exception contained in § 2617(a)(2)(B) is applicable to PCB disposal regulations, which are therefore not preempted. PEPCO argues that because of the fact that PCBs are treated in a separate provision of the statute (§ 2505(e)), all state PCB regulations—including those relating to disposal—are preempted. Because of the obvious importance of this issue and the conflict in the relevant judicial opinions, the question must be addressed in some detail.

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[3] The Court has accepted *amicus* briefs from the United States (on behalf of the EPA), the attorneys general of eight states (New York, California, Alabama, Ohio, Maine, Minnesota, Rhode Island, and Vermont), and the Chesapeake Bay Foundation. Although their arguments are not identical, all three groups argue strongly that Maryland's PCB disposal regulations are not preempted by § 2617 of TOSCA. The Court finds the EPA position to be of particular significance, in light of the fact that the EPA is the federal regulatory body whose preemptive authority is at issue in the case.

Section 2617(a)(2)(B) provides that if the EPA Administrator prescribes a rule or order under § 2604 or § 2605 applicable to a criminal substance or mixture, designed to protect against a risk of injury to health or environment, then state regulations governing that substance are preempted. There is no question that PCBs are in fact a chemical substance or mixture that presents an "unreasonable risk of injury to health or the environment" under § 2605(a) and that the Administrator has in fact prescribed rules governing PCBs. *See* 43 Fed. Reg. 7150 (1978), codified at 40 C.F.R. Part 761.

The parenthetical exception, however, removes a certain class of state regulations from the preemptive effect of § 2617(a)(2)(B). Specifically, the Administrator's rules imposing a requirement described in § 2605(a)(6) (governing manner or method of disposal of toxic substances) do not preempt state regulations. The result is that states remain free to impose certain regulatory burdens on the disposal of toxic substances. *See, e.g., Warren County v. State of North Carolina*, 528 F. Supp. 276, 289 (E.D. N.C. 1981) (Congress intended to give states and localities some leeway to impose more stringent disposal requirements than those provided for by federal regulation).

PEPCO argues that because federal PCB regulations were promulgated under § 2605(e) and not under § 2605(a) of TOSCA, regulations cannot be considered as a rule imposing a requirement described in § 2605(a)(6). In effect, PEPCO is asserting that PCB disposal regulations are to be treated differently than disposal regulations of all other toxic substances regulated by the Administrator.

Plaintiff's assertion is irreconcilable with the plain language of the statute and would require a finding that the words "described in" have the same meaning as "promulgated under." The Court is unwilling to reach such a conclusion. In construing statutory language,

courts must interpret the words according to their plain meaning. *Bouie v. City of Columbia*, 378 U.S. 347, 362-63 (1964). The two phrases have entirely different meanings, and it is logical to conclude that the regulation of a substance can be promulgated under a separate provision of the statute but can nonetheless prescribe disposal requirements *described in* § 2605(a)(6). The words "described in" allow for a broader scope than the substances regulated under § 2605(a); they govern *any* requirement *describing* a disposal regulation.

By definition, then, any PCB disposal regulations promulgated under § 2605(e) are regulations imposing requirements *described in* § 2605(a)(6). *See SED, Inc. v. City of Dayton*, 519 F. Supp. 979, 987 (S.D. Ohio 1981) (the § 2605(e) rules do "impose a requirement *described in* subsection (a)(6) of § 2605," i.e., disposal restrictions and prohibitions. The parenthetical in no sense requires that nonpreemptive federal regulations actually be enacted under § 2605(a)(6)). (emphasis in original) *See also Chappell v. SCA Services, Inc.*, 540 F. Supp. 1087, 1098 (C.D. Ill. 1982) (deferring to EPA position that "state requirements regarding disposal of PCBs are completely exempt from federal preemption . . .").

There is a clear explanation for Congress' having treated PCBs differently from all other toxic substances to be regulated by the Administrator. At the time of the passage of TOSCA, PCBs were already known to be extremely toxic, and Congress wanted to express a sense of urgency and a need for immediate regulation. As Senator Nelson stated, "[i]t is preferable not to enact legislation on a substance-by-substance basis, but rather generally, as the Toxic Substances bill proposes to do. However, the PCB problem shows no sign of abating and it has become so severe that it is necessary to address the problem head on . . . ." *See* United States brief at 11 n.15.

In effect, what Congress did by singling out PCBs as a toxic substance to be regulated, was to make the § 2605 (a) determination for the Administrator that PCBs present an unreasonable risk of injury to health or the environment. *Dow Chemical Co. v. Costle*, 484 F. Supp. 101, 102 n.1 (D. Del. 1980). That was the practical effect of Congress' inclusion of the separate provision for PCBs. Contrary to the assertions of PEPCO, there is nothing in the legislative history of TOSCA to indicate that Congress intended that PCB disposal should be treated differently with respect to preemption than any other substance.[4]

The only fair reading of the statutory language of § 2617 compels one to the conclusion that federal PCB disposal regulations do not preempt state PCB disposal requirements. As the defendant acknowledged at oral argument, there is, of course, an "outer limit" to such a conclusion, *e.g.*, a state could not impose disposal requirements that frustrated the federal plan or violated the Commerce Clause. *Accord Chappell*, 540 F. Supp. at 1098 (state PCB disposal regulations not preempted if not less restrictive than the federal regulations). This case, however, does not present the Court with any such outer limits; rather, Maryland's disposal regulations[5] supple-

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[4] PEPCO indicated at oral argument that there is language in some of the legislative history that indicates Congress was considering full preemption of state PCB regulations. That language is not at all conclusive, however, and must be read within the context of the entire Congressional debate. That context shows that Congress recognized the inherent interest of the States and political subdivisions respecting disposal of hazardous chemicals within their jurisdiction. United States brief at 16, quoting from the House Report on TOSCA.

[5] There is some dispute as to whether the term "disposal" includes just spillage and removal or also storage for disposal. The Court finds that the term "disposal" includes storage for disposal as well as both spillage and removal. Nothwithstanding its previous

ment existing federal disposal requirements and do not appear in any way to frustrate the overall federal plan. That result was fully within the contemplation of Congress.

B. *Applicable Case Law.*

A number of judicial opinions have addressed the issue of whether state PCB disposal requirements are preempted by TOSCA, and there is unfortunately a considerable degree of inconsistency in their conclusions. The Court is persuaded, however, that the opinions which actually examined the statutory language and legislative history support the defendants' position that the state disposal requirements are not preempted.

For example, in *SED*, 519 F. Supp. 979, the plaintiffs sought declaratory relief in challenging city ordinances that regulated, restricted, or prohibited storage of PCBs. The Court correctly reasoned that PCB disposal requirements impose a requirement "described in" § 2605(a)(6). *Id.* at 987. It went on to conclude, however (erroneously, in this Court's opinion), that the structure of the statutory language nonetheless showed that Congress did not intend state PCB disposal regulations to survive under the parenthetical exception. As the United States points out in its brief at 20-21, the court in *SED* was correct in its first conclusion that the disposal regulations under § 2605(e) were "described in" § 2605(a)(6), but incor-

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position to the contrary, the EPA considers that state regulations governing storage for disposal as well as actual disposal are free from preemption. *See* letter of EPA General Counsel A. James Barnes to defendant Sachs, Exhibit F, attached to Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment.

That view is entitled to "considerable deference" from the Court. Chemical Manufacturers Association v. Natural Resources Defense Council, —— U.S. ——, 105 S.Ct. 1102, 1108 (1985).

rect in its second conclusion that the parenthetical exception alone would not save the city's ordinance.[6]

In *Chappell*, 540 F. Supp. 1087, the plaintiffs brought a class action suit to recover damages for nuisance from the operator of a hazardous waste landfill. The court reviewed the statutory language of TOSCA and found that it was "reasonable to conclude that state laws relating to *disposal* of chemical substances are not preempted by the TSCA." *Id.* at 1098. (emphasis in original). The *Chappell* court read the language of § 2617(a)(2)(B) in conjunction with § 2605(a)(6)(B)[7] and agreed with the EPA's position that state PCB disposal regulations are not preempted. That reasoning is consistent with the Congressional intent behind TOSCA. As Representative Broyhill pointed out, "there is nothing in this act that affects the right of States to act in their authority over disposal of hazardous properties or hazardous chemicals. . . ." Chesapeake Bay Foundation brief at 14.

In *Twitty v. North Carolina*, 527 F. Supp. 778 (E.D. N.C. 1981), *aff'd without opinion*, 696 F.2d 992 (4th Cir. 1982), a case upon which PEPCO relies, the owners of land adjacent to property designated as a hazardous waste landfill sought to enjoin the use of the land for that purpose. Among the five causes of action listed was

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[6] Ultimately, the court in *SED* concluded that the City's ordinance was valid under the "other federal law" exception of § 2617. This Court expresses no views on that issue, concluding that the parenthetical exception alone permits Maryland to regulate PCB disposal.

[7] Section 2605(a)(6)(B) provides in pertinent part that a disposal requirement issued by EPA "may not require any person to take any action which would be in violation of any law or requirement of, or in effect for, a state or political subdivision . . . ." The court in *Chappell* seemed to be recognizing that if this provision were to have any meaning at all, state disposal laws must remain in effect. As the Chesapeake Bay Foundation states, § 2605(a)(6)(B) "is premised on an assumption that state regulations on hazardous waste disposal will remain valid . . . ." Chesapeake Bay Foundation brief at 11. That reasoning seems entirely correct.

one that the disposal of toxic waste, including PCBs, would violate a local county ordinance. In summary fashion, the district court rejected the argument, saying only that TOSCA preempts "any local ordinances." *Id.* at 781. The district court opinion in *Twitty* must, however, be read in conjunction with *Warren County v. State of North Carolina*, 528 F. Supp. 276 (E.D. N.C. 1981), the companion case to *Twitty*, involving the same hazardous waste landfill. In *Warren County*, the court struck down a county ordinance that flatly prohibited the disposal of PCBs in the county as violative of the federal regulatory scheme envisioned by TOSCA. The court noted, however, that Congress intended to give states and localities some leeway to impose more stringent disposal requirements than those provided for by federal regulation. *Id.* at 289. Only an outright ban would be prohibited. That statement clearly limits the broad, summary language in *Twitty* which PEPCO invokes.

PEPCO places much reliance on a Fifth Circuit case, *Rollins Environmental Services (FS), Inc. v. Parish of St. James*, 775 F.2d 627 (5th Cir. 1985). The plaintiff, a toxic waste disposal firm, brought suit against a local parish, challenging the legality of an ordinance whereby the parish had prohibited toxic waste disposal, including disposal of PCBs. The court found that the parish's ordinance was preempted by TOSCA but devoted most of its analysis to the question of whether the prohibition against "commercial solvent cleaning businesses" was in fact a sham for a prohibition against the disposal of PCBs. Ultimately the court did conclude that the ordinance was indeed a sham and that an outright prohibition on PCB disposal would frustrate the scheme of TOSCA for the handling of PCBs.

It was only in a footnote that the court addressed the issue of the applicability of the parenthetical exception. Reasoning that the EPA's PCB rules were promulgated under § 2605(e), not § 2605(a), the court concluded—

without any analysis of the statutory language or legislative history—that the parenthetical exception did not apply. *Id.* at 634 n.7. The Court does not regard this analysis as controlling.

The other cases relied upon by PEPCO contain similar analytical flaws. For example, in *Chemical Waste Management, Inc. v. Broadwater*, Civil Action No. 84-G-1208-W (N.D. Ala. 1984) (Exhibit C, attached to Memorandum of Points and Authorities in Support of Motion for Summary Judgment), *appeal dismissed as moot*, 758 F.2d 1538 (11th Cir. 1985), the plaintiff, a waste management company, sought preliminary injunctive relief from an order of a state environmental agency, on grounds of federal preemption under TOSCA. The order would have had the effect of closing a substantial portion of the operations of the hazardous waste treatment, storage, and disposal facility operated by the plaintiff. The court granted the preliminary injunction, finding that Congress' inclusion of a separate provision for PCBs rendered the parenthetical exception inapplicable. The court, however, did not evaluate the significance of the phrase "described in" and simply assumed that Congress meant to preempt PCB disposal, in addition to the other aspects of PCB handling.

Similarly, in *City of Middletown v. Hartford Electric Light Co.*, Civil Action No. 33133 (Conn. 1981) (Exhibit D, attached to plaintiff's memorandum in support of motion for summary judgment), the court did not examine the issue in depth. In *Middletown*, the defendant utility company operated a high efficiency boiler and proposed to burn 30,000 gallons of PCB contaminated oil at the facility. The city sought injunctive relief in state court for alleged violations of the local zoning ordinances. The court determined that the parenthetical exception did not apply, because PCB regulations under TOSCA were promulgated under § 2605(e) and not § 2605(a)(6). Recognizing that "regulation of PCB disposal might ap-

pear to be authorized under Sec. 2605(a)(6)," the *Middletown* court reasoned that such a conclusion would render § 2605(e)(1)(A) (which requires the Administrator to promulgate PCB disposal rules) a nullity. *Id.* at 25.

That reasoning simply ignores the Congressional intent to allow states some freedom to regulate the disposal of PCBs as well as other toxic chemicals. *See Warren*, 528 F. Supp. at 289. As in *Rollins* and *Chemical Waste Management*, the court in *Middletown* failed to adequately analyze the actual language of the statute—specifically, the words "described in,"—and took no note of the legislative history of the statute.

A contrary conclusion would produce the anomalous result of prohibiting any state disposal regulation of the one substance that Congress found so toxic and dangerous that it required special attention in the statute. Congress recognized that the states should retain some control, under their respective police powers, to regulate disposal of toxic hazards posing a threat to the health and safety of their citizens. That is the very purpose of the parenthetical exception in § 2617(a)(2)(B). It turns Congressional intent on its head to argue that Congress would identify a substance as particularly toxic and at the same time emasculate all state efforts to regulate its disposal within state borders. Congress did intend to preempt certain activities related to PCBs, such as manufacture and transportation. With respect to disposal, however, Congress intended a result that would allow for both the states and the federal agencies to regulate the disposal of toxic substances in a cooperative effort.

V. CONCLUSION

Maryland's PCB disposal regulations are not preempted by § 2617 of TOSCA. Since Congress has determined that PCBs represent an unreasonable risk of injury to health or the environment, federal PCB disposal regulations are therefore "described in" § 2605(a)(6). Accord-

ingly, the parenthetical exception contained in § 2617 (a) (2) (B) applies, removing the preemptive effect of federal regulation over state disposal requirements. The states remain free to regulate the disposal of PCBs in a manner that ultimately does not frustrate the purpose of the federal goal of reducing the dangers from toxic substances.

Having determined that the resolution of the parenthetical exception issue conclusively answers the question presented in this case, the Court does not reach the three other exceptions in § 2617 which might provide additional bases upon which the State could argue that its disposal regulations are not preempted.

There are no outstanding issues of material fact with respect to this dispositive issue in this litigation. Notwithstanding the fact that the defendants have urged the Court to proceed to trial and have not filed any cross-motion for summary judgment, the Court finds that the defendants are entitled to judgment as a matter of law. Further proceedings on the merits would be pointless.

The Court therefore denies the plaintiff's motion for sumamry judgment and will enter an appropriate declaartory judgment order, consistent with this opinion.

Dated: April 16, 1986

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-1573

THE POTOMAC ELECTRIC POWER COMPANY,
Appellee,

versus

STEPHEN H. SACHS in his capacity as Attorney General of Maryland; ADELE WILZACK, in her capacity as Secretary of the Maryland Department of Health and Mental Hygiene,
Appellants,

STATE OF NEW YORK,
Amicus Curiae,

STATE OF ALABAMA,
Amicus Curiae,

NIAGARA MOHAWK POWER CORPORATION,
Amicus Curiae,

EDISON ELECTRIC INSTITUTE,
Amicus Curiae,

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Amicus Curiae,

AMERICAN PUBLIC POWER ASSOCIATION,
Amicus Curiae,

AMERICAN ELECTRIC POWER SERVICE CORPORATION,
Amicus Curiae,

APPALACHIAN POWER COMPANY,
Amicus Curiae,

COLUMBUS & SOUTHERN OHIO ELECTRIC COMPANY,
Amicus Curiae,

INDIANA & MICHIGAN ELECTRIC COMPANY,
Amicus Curiae,

OHIO POWER COMPANY,
Amicus Curiae,

ATLANTIC CITY ELECTRIC COMPANY,
Amicus Curiae,

BALTIMORE GAS & ELECTRIC COMPANY,
Amicus Curiae,

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Amicus Curiae,

CENTRAL ILLINOIS LIGHT COMPANY,
Amicus Curiae,

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Amicus Curiae,

CENTRAL & SOUTH WEST SERVICES,
Amicus Curiae,

CINCINNATI GAS & ELECTRIC COMPANY,
Amicus Curiae,

COMMONWEALTH EDISON COMPANY,
Amicus Curiae,

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Amicus Curiae,

DAYTON POWER & LIGHT COMPANY,
Amicus Curiae,

DELMARVA POWER & LIGHT COMPANY,
Amicus Curiae,

DUKE POWER COMPANY,
Amicus Curiae,

DUQUESNE LIGHT COMPANY
Amicus Curiae,

FLORIDA POWER & LIGHT COMPANY,
Amicus Curiae,

HOUSTON LIGHTING & POWER COMPANY,
Amicus Curiae,

ILLINOIS POWER COMPANY,
Amicus Curiae,

INDIANAPOLIS POWER & LIGHT COMPANY,
Amicus Curiae,

IOWA POWER & LIGHT COMPANY,
Amicus Curiae,

IOWA PUBLIC SERVICE COMPANY,
Amicus Curiae,

JERSEY CENTRAL POWER & LIGHT COMPANY,
Amicus Curiae,

MADISON GAS & ELECTRIC COMPANY,
Amicus Curiae,

MINNESOTA POWER & LIGHT COMPANY,
Amicus Curiae,

MONOGAHELA POWER COMPANY,
Amicus Curiae,

MONTAUP ELECTRIC COMPANY,
Amicus Curiae,

NEW ENGLAND POWER COMPANY,
Amicus Curiae,

NEW YORK STATE ELECTRIC & GAS CORPORATION,
Amicus Curiae,

OHIO VALLEY ELECTRIC CORPORATION,
Amicus Curiae,

OKLAHOMA GAS & ELECTRIC COMPANY,
Amicus Curiae,

PACIFIC GAS & ELECTRIC COMPANY,
Amicus Curiae,

PACIFIC POWER & LIGHT COMPANY,
Amicus Curiae,

PENNSYLVANIA POWER & LIGHT COMPANY,
Amicus Curiae,

PHILADELPHIA ELECTRIC COMPANY,
Amicus Curiae,

PUBLIC SERVICE ELECTRIC & GAS COMPANY,
Amicus Curiae,

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Amicus Curiae,

SOUTHERN CALIFORNIA EDISON COMPANY,
Amicus Curiae,

SOUTHERN COMPANY SERVICES, INC.,
Amicus Curiae,

ALABAMA POWER COMPANY,
Amicus Curiae,

GEORGIA POWER COMPANY,
Amicus Curiae,

GULF POWER COMPANY,
Amicus Curiae,

MISSISSIPPI POWER COMPANY,
Amicus Curiae,

TAMPA ELECTRIC COMPANY,
Amicus Curiae,

TEXAS UTILITIES GENERATING COMPANY,
Amicus Curiae,

CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Amicus Curiae,

DETROIT EDISON COMPANY,
Amicus Curiae,

POTOMAC EDISON COMPANY,
Amicus Curiae,

TOLEDO EDISON COMPANY,
Amicus Curiae,

UNION ELECTRIC COMPANY,
Amicus Curiae,

VIRGINIA ELECTRIC POWER COMPANY,
Amicus Curiae,

WEST PENN POWER COMPANY,
Amicus Curiae,

WISCONSIN ELECTRIC POWER COMPANY,
Amicus Curiae,

WISCONSIN POWER & LIGHT COMPANY,
Amicus Curiae,

WISCONSIN PUBLIC SERVICE CORPORATION,
Amicus Curiae,

CHESAPEAKE BAY FOUNDATION,
Amicus Curiae,

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Amicus Curiae,

UNITED STATES OF AMERICA,
Amicus Curiae.

Appeal from the United States District Court
for the District of Maryland

[Filed Oct. 17, 1986]

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed and remanded for proceedings consistent with this opinion.

/s/ John M. Greacen
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. B-86-220

THE POTOMAC ELECTRIC POWER COMPANY

v.

STEPHEN H. SACHS, in his capacity as Attorney General of Maryland, and ADELE WILZACK, in her capacity as Secretary of the Maryland Department of Health and Mental Hygiene

---

ORDER

Presently pending in this litigation is Defendants' Motion to Dismiss, or for Summary Judgment Based Upon Lack of Jurisdiction, or for Stay (Paper 9), as to which plaintiff has filed an opposition. Supplemental memoranda have been filed on behalf of both plaintiff and defendants; and the Court considers the issues to have been comprehensively briefed. In addition, the Court has had the benefit of oral argument on behalf of all parties at a hearing herein on March 13, 1986.

Pursuant to an oral opinion to be rendered at a hearing in this case on March 27, 1986, IT IS, this 25th day of March, 1986, ORDERED as follows:

1. That the Defendants' Motion to Dismiss, or for Summary Judgment Based Upon Lack of Jurisdiction, or for Stay (Paper 9), BE, and the same hereby IS,

DENIED, in all respects, and as to all of the relief sought.

2. That copies of this Order are being transmitted to counsel of record by the Court.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. B-86-220

THE POTOMAC ELECTRIC POWER COMPANY

v.

STEPHEN H. SACHS, in his capacity as Attorney General of Maryland, and ADELE WILZACK, in her capacity as Secretary of the Maryland Department of Health and Mental Hygiene

---

DECLARATORY JUDGMENT ORDER

On January 22, 1986, plaintiff, The Potomac Electric Power Company, filed its Verified Complaint for Declaratory Judgment herein, and contemporaneously filed Plaintiff's Motion for Summary Judgment, which was accepted by the Court for filing on February 11, 1986. Subsequently, on February 25, 1986, an opposition to plaintiff's motion was filed on behalf of defendants, Stephen H. Sachs, in his capacity as Attorney General of Maryland, and Adele Wilzack, in her capacity as Secretary of the Maryland Department of Health and Mental Hygiene. The Court considers the issues to have been fully briefed. The Court also had the benefit of oral argument presented by counsel for the parties at a hearing herein on March 27, 1986.

In accordance with the foregoing opinion of the Court, IT IS, this 16th day of April, 1986, ORDERED, ADJUDGED and DECREED as follows:

1. That Plaintiff's Motion for Summary Judgment BE, and the same hereby IS, DENIED.

2. That the laws and regulations of the State of Maryland which establish requirements governing the manner and method of disposal of polychlorinated biphenyls (PCBs) are not preempted by the provisions of the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (TOSCA).

3. That the defendants' costs in this litigation shall be borne by plaintiff.

4. That the Clerk shall transmit copies of the foregoing opinion and this Declaratory Judgment Order to counsel of record for the parties to this litigation.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

FILED
DEC 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-871

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

STEPHEN H. SACHS,
ATTORNEY GENERAL OF MARYLAND, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN H. SACHS,
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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the Court below apply correctly the doctrine of Younger v. Harris, 401 U.S. 37 (1971), when it held that abstention was required because a pending state grand jury investigation of the plaintiff is a state judicial proceeding to which the federal courts must defer?

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No. 86-871

IN THE
SUPREME COURT FOR THE UNITED STATES

October Term, 1986

THE POTOMAC ELECTRIC POWER COMPANY,

Petitioner,

v.

STEPHEN H. SACHS,
ATTORNEY GENERAL OF MARYLAND, et al.,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

As the district court found, "PEPCO [Potomac Electric Power Company] brought this suit in federal court in an apparent attempt to foreclose the possibility of a state criminal prosecution." 639 F.Supp. 856, 858

(D.Md. 1986) (App. at 34a).[1] The state grand jury was seeking to determine whether PEPCO had violated Maryland's criminal hazardous waste disposal laws.

Between 1981 and 1983, PEPCO sold scrap electrical transformers to the United Rigging and Hauling Company ("United Rigging") of Beltsville, Maryland. Some of the transformers contained oil contaminated with polychlorinated biphenyls ("PCBs").[2] In April, 1985, the Attorney General of Maryland started a state grand jury criminal investigation of PEPCO's and United Rigging's PCB-disposal

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[1] Citations in the form "App. at ___" are to the appendix to PEPCO's petition for certiorari.

[2] PCBs are "a highly toxic carcinogen." Midlantic National Bank v. New Jersey Dept. of Environmental Protection, ___ U.S. ___, 106 S.Ct. 755, 757 (1986).

actions.[3] That investigation included a court-authorized search of United Rigging's site, chemical tests of oil in transformers identified as among those purchased from PEPCO that showed high PCB concentrations, and grand jury subpoenas to PEPCO for documents and to its employees for testimony.

PEPCO tried to stop the State's criminal investigation by filing this federal declaratory judgment action. PEPCO's complaint alleged that Maryland's criminal hazardous waste disposal laws are preempted by the federal Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§2601, et seq. The State moved to dismiss PEPCO's complaint on the ground, among others, that the State's then-pending state grand jury investigation of

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[3] While this case was pending in the Fourth Circuit, United Rigging pleaded guilty to violating Maryland's water pollution law, Md. Health Envir. Code Ann. §9-322. See 802 F.2d 1527, 1529 n.5 (4th Cir. 1986) (App. at 13a n.5).

PEPCO was a state judicial proceeding to which the federal court was required to abstain under the doctrine of Younger v. Harris, 401 U.S. 37 (1971). The district court denied that motion (App. at 26a - 30a), notwithstanding its finding that "[t]here is little question from the record . . . that an indictment of PEPCO for alleged responsibility for or participation in the United Rigging contamination is imminent." 638 F.Supp. at 857 (App. at 34a).

On the merits, however, the district court rejected PEPCO's argument that Maryland's hazardous waste disposal laws are preempted by TSCA. 639 F.Supp. 856 (App. at 31a). PEPCO appealed that decision, and the State cross-appealed the denial of its motion to dismiss. On appeal, the Fourth Circuit reversed the district court's Younger decision, holding that abstention was required because a state grand jury proceeding is a

judicial proceeding to which the federal courts must defer. 802 F.2d 1527 (App. at 1a). PEPCO's petition to this Court followed.

On December 9, 1986, subsequent to the filing of PEPCO's petition in this Court, PEPCO's counsel was advised by the Assistant Attorney General conducting the State's criminal investigation that the State had decided to suspend its investigation because of a pending federal investigation into the same matters. See Appendix to PEPCO's Supplemental Brief.

REASONS FOR DENYING THE WRIT

Summary

The Fourth Circuit applied correctly this Court's long line of Younger decisions. There is no merit to PEPCO's argument that Maryland grand jury proceedings are not state judicial proceedings involving important state interests. This Court has made it

emphatically clear that absent extraordinary circumstances federal courts must abstain when the federal plaintiff is involved in ongoing state judicial proceedings.

Abstention is particularly necessary when the federal plaintiff is the subject of a state grand jury investigation. Failure to abstain in such a case would result in substantial federal judicial interference in state criminal investigatory and prosecutorial functions and would be inconsistent with Younger's core principles of comity and federalism.

The suspension of the State's investigation of PEPCO makes the issue raised in the petition for certiorari moot. This case should not, however, be remanded to the Fourth Circuit, as PEPCO requests in its Supplemental Brief, because the Younger issue was decided correctly by the Fourth Circuit as PEPCO was under investigation by a state

grand jury when this action was filed and while the case was pending in the district and lower appellate courts. Contrary to PEPCO's arguments, Younger abstention is required if the federal plaintiff is the subject of state judicial proceedings when the case is first heard in the district court. Because PEPCO was then under investigation by a state grand jury, abstention was mandated, this case should have been dismissed then, and there is no basis for any further proceedings.

I. This case involves no novel issues on which the lower courts require the guidance of this Court.

A. The Fourth Circuit's decision is in accordance with this Court's long line of Younger abstention decisions.

Younger v. Harris, 401 U.S. 37 (1971), and its progeny require federal courts to abstain from enjoining, or issuing a declara-

tory judgment, with respect to a state judicial proceeding, even if pursued under a possibly unconstitutional statute, provided three conditions are satisfied: (1) there are ongoing state judicial proceedings; (2) the ongoing state judicial proceedings implicate an important state interest; and (3) there is an adequate opportunity in the ongoing state proceedings to raise constitutional challenges. See Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 432 (1982). Abstention was mandated in this case because these three conditions existed when this case was heard and decided in the district court.

This Court has long recognized that grand jury proceedings are judicial proceedings. See, e.g., Ex Parte Young, 209 U.S. 123, 163 (1908) (describing the grand jury as "part of the machinery of a criminal court"); Cobbledick v. United States, 309 U.S. 323,

327 (1940) ("The Constitution itself makes the grand jury a part of the judicial process."); Levine v. United States, 362 U.S. 610, 617 (1960) (grand jury proceedings constitute a judicial inquiry). This point is equally clear under Maryland law. See, e.g., Duckett v. Touhey, 36 Md.App. 238, 242, 373 A.2d 323, 325 (1977).

The State has an obviously important, indeed paramount, interest in preserving the independence and integrity of its grand jury proceedings. That interest includes unfettered authority to investigate those whom prosecutorial authorities believe to have violated the State's criminal laws. Federal judicial interference in this area of critical state concern is, as the Fourth Circuit correctly recognized, flatly inconsistent with Younger's fundamental principles of comity and federalism. See 802 F.2d at 1530-31.

The third prong of Younger - an adequate state opportunity to raise constitutional challenges - was also satisfied here. PEPCO has never claimed that Maryland's courts are incapable of deciding its federal preemption claim, if it were indicted.[4] Rather, PEPCO's sole complaint involves when it is afforded the opportunity to present its federal claims. See Petition, e.g., at 16 ("PEPCO, however, will only have an opportunity to raise its claims 'if indicted.'") (citation omitted). This Court, however, has rejected repeatedly the argument that Younger is inapplicable because the opportunity to present federal claims is provided later rather than sooner. See Moore v. Sims, 442 U.S. 415 (1979); Middlesex County Ethics Comm. v.

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[4] Were PEPCO to make such a claim, it is clear that it would be without merit. This Court has emphatically rejected the assertion that state courts are somehow less competent than federal courts to decide federal issues. See Moore v. Sims, 442 U.S. 415, 430 (1979).

Garden State Bar Ass'n, 457 U.S. 423 (1982); Ohio Civil Rights Comm. v. Dayton Christian Schools, Inc., ___ U.S. ___, 106 S.Ct. 2718 (1986).

The fallacy of PEPCO's argument is shown perhaps most clearly by this Court's reversal of the Third Circuit in Middlesex. The Third Circuit's rationale for not abstaining was that "the state proceedings have not yet reached a stage at which [plaintiff] Hinds' constitutional claims may be adjudicated. . . ." Garden State Bar Ass'n v. Middlesex County Ethics Comm., 643 F.2d 119, 130 (1980). As this Court held, however, abstention was required in Middlesex because state law did not bar the interposition of the federal plaintiff's constitutional claims. Notwithstanding the federal plaintiff's dissatisfaction with when the opportunity to raise federal claims was provided, abstention was required because state

law clearly provided the opportunity to raise federal claims at some point. The same is true in this case.

An equally direct rejection of PEPCO's timing (or instant gratification) theory of abstention is the decision last Term in Ohio Civil Rights Commission. There, the Court held that Younger abstention was required even if federal claims could not be raised before the administrative agency because "constitutional claims may be raised in state court judicial review of the administrative proceeding." 106 S.Ct. at 2724.[5]

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[5] Because this judicial review would occur in proceedings altogether separate from and clearly subsequent to the administrative proceedings, PEPCO is just plain wrong when it asserts that "[t]his Court . . . has never required abstention when the plaintiff had no present opportunity to raise his federal claims in pending state adjudicatory proceedings." Petition at 15 (emphasis in original).

Samuels v. Mackell, 401 U.S. 66 (1971), fully answers PEPCO's alternative argument that the Younger abstention doctrine is inapplicable to preemption claims. Notwithstanding the plaintiff's claim there that a New York statute was preempted, 401 U.S. at 67, abstention was required. In addition, this alternative argument is altogether illogical.

A supremacy clause claim is not entitled to a lower abstention standard than is a preferred First Amendment claim, for example. This Court has, of course, held that abstention may be required even when the plaintiff claims that the challenged state action violates First Amendment rights. See, e.g., Younger v. Harris; Ohio Civil Rights Comm. v. Dayton Christian Schools, Inc. Therefore, a plaintiff, like PEPCO, who relies upon a federal statute and the supremacy clause as the bases for challenging a state's actions

should not be more favored than a First Amendment plaintiff, particularly when this Court has held that a supremacy clause-derived preemption claim is not a constitutional claim. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979).

The suspension of the State's investigation illustrates graphically both the soundness of the Younger doctrine in general and the applicability of the doctrine to this case. The State's criminal investigation, including grand jury proceedings, went forward without federal interference. The conclusion of this state proceeding has been a decision to suspend the investigation. Thus, the State's thoroughly legitimate interest in unfettered prosecutorial authority has been preserved and the matter has come to an end without the necessity for any court, and most especially a federal court, to get involved.

B. The Fourth Circuit's decision is in accord with the vast majority of appellate and district court decisions on this issue.

PEPCO makes much of the conflict between the Fourth Circuit's decision in this case and the Third Circuit's decision in Monaghan v. Deakins, 798 F.2d 632 (1986), petition for certiorari pending No. 86-890. That argument obscures the plain fact that Monaghan is truly an anomaly which is flatly inconsistent with the clear holdings of this Court, see 7 - 14, supra,[6] and with a body of lower court decisions holding that a state grand jury proceeding constitutes a state judicial

[6] The flaw in the Third Circuit's analysis in Monaghan is the same as that in its earlier decision in Middlesex. In both cases, the Third Circuit held Younger inapplicable because of when state law provided an opportunity to raise federal claims. That is the wrong inquiry. As this Court's decisions make plain, the proper inquiry is whether state law provides such an opportunity, not when. See, e.g., Moore v. Sims, 442 U.S. at 425.

proceeding for Younger purposes. See Craig v. Barney, 678 F.2d 1200, 1202 (4th Cir.), cert. denied, 459 U.S. 860 (1982); Kaylor v. Fields, 661 F.2d 1177, 1181 (8th Cir. 1981); Law Firm of Daniel P. Foster v. Dearie, 613 F.Supp. 278, 280 (E.D.N.Y. 1985); Sovereign News v. Falke, 448 F.Supp. 306, 347-359 (N.D.Ohio 1977), remanded on other grounds, 610 F.2d 428 (6th Cir. 1979); Notey v. Hynes, 418 F.Supp. 1320, 1326 (E.D.N.Y. 1976).

Because the Fourth Circuit's decision in this case is completely consistent with the decisions of this Court, as well as a well-developed body of lower court decisions, further review is unwarranted.

II. PEPCO's declaratory judgment complaint in which it sought a determination of the validity of a federal defense to a state indictment did not state a claim "arising under the Constitution, laws, or treaties of the United States."

This case is an inappropriate vehicle to decide the Younger issue for the additional

reason that PEPCO's declaratory judgment complaint failed to state a "federal question" within the meaning of 28 U.S.C. §1331.[7] This Court has never held that the Declaratory Judgment Act, 28 U.S.C. §§2201-2202, authorizes the federal courts to determine the validity of a federal defense to a state charge. This Court has held repeatedly, however, that federal question jurisdiction does not exist where the complaint anticipates a defense based on federal law to a threatened state action. See Gully v. First National

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[7] The State moved to dismiss PEPCO's complaint based upon lack of jurisdiction as well as Younger abstention. The district court denied both motions (App. at 20a - 30a), but then rejected PEPCO's preemption claim and ruled for the State on the merits. 639 F.Supp. 856 (App. at 31a). PEPCO appealed this decision, and the State cross-appealed the district court's denial of its motion to dismiss based upon lack of jurisdiction and Younger abstention. The Fourth Circuit rejected the State's jurisdictional argument, 802 F.2d at 1529, n.3 (App. at 12a, n. 3), but agreed that abstention was mandated. 802 F.2d 1527 (App. at 1a).

Bank in Meridian, 299 U.S. 109, 116-18 (1936); Louisville v. Nashville Railroad Co. v. Mottley, 211 U.S. 149, 152-54 (1908).

Here, because "the character of the threatened action", see Public Service Comm'n of Utah v. Wycoff, 344 U.S. 237, 248 (1952), is an indictment for violating state law, this suit does not "arise under" federal law as required by 28 U.S.C. §1331. Rather, federal law enters this case only because PEPCO filed this declaratory judgment suit as a defensive action, thereby hoping to defeat prosecution under state law.[8]

The concurring opinion of now-Chief

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[8] This Court has "consistently emphasized that, in exploring the outer reaches of §1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." Merrell Dow Pharmaceuticals, Inc. v. Thompson, ___ U.S. ___, 106 S.Ct. 3229, 3233 (1986). Holding that jurisdiction exists here expands federal judicial power at the expense of the State's ability to conduct criminal investigations.

Justice Rehnquist in Steffel v. Thompson, 415 U.S. 452 (1974), makes clear that the lower courts' jurisdictional holdings are incompatible with the history and purpose of the Declaratory Judgment Act:

> First, the legislative history of the Declaratory Judgment Act and the Court's opinion in this case both recognized that the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity. There is nothing in the Act's history to suggest that congress intended to provide persons wishing to violate state laws with a federal shield behind which they could carry on their contemplated conduct. Thus, I do not believe that a federal plaintiff in a declaratory judgment action can avoid, by the mere filing of a complaint, the principles so firmly expressed in Samuels [v. Mackell, 401 U.S. 66 (1971)], supra. The plaintiff who continues to violate a state statute after the filing of his federal complaint does so both at the risk of state prosecution and at the risk of dismissal of his federal lawsuit. For any arrest prior to resolution of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of Samuels.

415 U.S. at 479-80 (emphasis added).

Because the Declaratory Judgment Act does not "provide persons wishing to violate state laws with a federal shield behind which they could carry on their contemplated conduct" (emphasis added), the Act certainly should not be interpreted to provide persons who are under grand jury investigation for having violated state criminal laws in the past with a federal shield to avoid state prosecution.

Federal question jurisdiction was not intended to assist those who seek to prevent state authorities from determining whether the state's criminal laws have been violated. Simply stated, clever federal declaratory judgment pleading should not be permitted to convert what is plainly a state matter into a federal case.[9]

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[9] In People of the State of Illinois v. Archer Daniels Midland Co., 704 F.2d 935 (7th Cir. 1983), Judge Posner analyzed closely the jurisdictional issue presented here and (cont'd)

III. The issue presented by PEPCO's petition is moot because the State has suspended its criminal investigation.

Review should not be granted in this case because the only issue presented by the petition is rendered moot by the fact that the State has suspended its criminal investigation. Indeed, PEPCO's Supplemental Brief is largely devoted to conceding that the issue raised in its petition is moot. Thus, this case is not an appropriate one for the Court to decide the applicability of Younger to state grand jury proceedings.

Having conceded that its petition for certiorari is moot, PEPCO nevertheless claims

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reached the opposite conclusion as that reached by the Fourth Circuit. The State's Attorney in Archer Daniels Midland filed a state declaratory judgment action seeking a determination of whether the Illinois Strike-breakers Act was preempted by federal law. The Archer Daniels Midland Company removed the case to federal court, claiming, as PEPCO did, that the state law was preempted. 704 F.2d at 938. The Seventh Circuit held that the district court lacked jurisdiction. Id. at 943.

that its case is not. For two reasons, this is incorrect and the proper disposition of this case is denial of certiorari, not remand to the Fourth Circuit. First, absent the threat of indictment, there would not have been a case or controversy. Now that that threat has been removed, there is no case or controversy. And second, this Court has made it clear that the applicability of Younger is to be determined when the case is heard in the district court.

PEPCO filed this action for one reason and one reason only: because of the threat of indictment. While PEPCO seeks to obscure that point now, the truth was clear to both the Fourth Circuit and the district court. See, e.g., 802 F.2d at 1529, n. 5 (App. at 13a, n. 5) (quoting district court's conclusion that "an indictment of PEPCO for alleged responsibility for or participation in the United Rigging contamination is imminent."),

and 639 F.Supp. at 858 (App. at 34a) ("PEPCO brought this suit in federal court in an apparent attempt to foreclose the possibility of a state criminal prosecution."). PEPCO has never disputed these findings regarding its reason for filing this case.[10]

Now that the jurisdictional predicate for this declaratory judgment action has been removed, there is no case or controversy. This is not, therefore, a traditional mootness on appeal case in which the proper disposition is remand for further proceedings on outstanding issues, see, e.g., University of Texas v. Camenisch, 451 U.S. 390 (1981), because here the threat of indictment gave

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[10] Indeed, rather than disputing the fact that it was the threat of indictment that caused it to file and pursue this case very aggressively, PEPCO sought extraordinary expedition in the Fourth Circuit on the ground that "it is likely that PEPCO will be charged in an indictment before this Court resolves the appeal." See PEPCO's Motion to Expedite ¶5.

rise to the filing of the suit and the Younger issue raised in the petition. Absent that threat, there is no Article III case or controversy. In truth, PEPCO is asking this Court to amend its complaint by speculating about a case it did not bring,[11] and which would not have been justiciable in any event. Without the threat of indictment, the case would have lacked and now does lack the jurisdictionally required degree of concrete controversy. See Toilet Goods Association v. Gardner, 387 U.S. 158, 162-66 (1967); Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298-99 (1979).

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[11] PEPCO strains in its Supplemental Brief to claim that "[a] live controversy continues to exist between the parties with respect to the preemption issue." Id. at 3. PEPCO cannot explain, however, and thus does not attempt to explain, (1) why it never challenged Maryland's PCB disposal laws until it was under investigation by a state grand jury, and (2) what enforcement action, if any, Maryland has taken, will take, or contemplates taking other than the now-suspended grand jury proceeding.

Furthermore, this Court has made it clear that the applicability of Younger is determined as of when proceedings of substance occur in the district court, and not, as PEPCO suggests, based on the status of the state proceedings when the case finally reaches this Court. See Younger v. Harris, 401 U.S. at 41; Perez v. Ledesma, 401 U.S. 82, 85 n.2 (1971); Hicks v. Miranda, 422 U.S. 332, 349 (1975). The Sixth Circuit recently applied this reasoning in Zalman v. Armstrong, 802 F.2d 199, 203 (1986):

> In our view, the principles underlying Younger require that the initial frame of reference for abstention purposes be determined at the time that the federal complaint is filed, or at the very latest, at the time a hearing is held on the merits in federal court. Any other rule would, in many cases, permit a district court to directly interfere in an ongoing state proceeding and yet preclude a review of the propriety of that interference by an appellate court.

The Younger issue presented by the petition was decided correctly by the Fourth Circuit. That issue, however, is now moot, but without the threat of indictment, there is no case or controversy. Further proceedings are inappropriate.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 86-871

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE POTOMAC ELECTRIC POWER COMPANY,
Petitioner,
v.
STEPHEN H. SACHS, ATTORNEY GENERAL OF MARYLAND, AND ADELE WILZACK, SECRETARY OF THE MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Petitioner, the Potomac Electric Power Company ("PEPCO"), submits this supplemental brief pursuant to Supreme Court Rule 22.6 to call to the attention of the Court an important factual development subsequent to the filing of the petition.[1] In light of that development, PEPCO respectfully requests that the Court grant the writ, vacate the opinion and judgment below, and remand the case to the Fourth Circuit for reconsideration.

1. The court below held that federal courts must abstain in favor of state grand jury investigations. From mid-1985 through the filing of the instant petition on December 1, 1986, PEPCO was the subject of such an investigation by a Maryland grand jury. *See* App. to

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[1] The statement required pursuant to Rule 28.1 appears in the Petition at ii n.*.

Pet. at 13a. The decision of the court below that abstention was required was based solely on the pendency of the grand jury investigation of PEPCO. *See id.* at 17a-19a.

On December 9, 1986, however—shortly after filing and service of the instant petition—the Office of the Attorney General of Maryland [2] sent counsel for petitioner a letter advising that, in light of the initiation of an investigation by federal authorities, "we have decided to suspend our own investigation involving PEPCO." The letter noted that "[a]s with all investigations by this office, the PEPCO matter is subject to re-examination should new evidence become available at a future time which would warrant re-opening of the investigation." [3]

2. The court below should be afforded an opportunity to consider the effect of this new development, including whether the abstention issue is now moot. The court may well decide that abstention is no longer appropriate, since the only pending state proceeding on which it relied—the grand jury investigation—has appparently ended.[4]

While the State's action may have mooted the question decided below and presented to this Court in the petition, the case itself is not moot. PEPCO commenced the instant case seeking a declaratory judgment that federal law preempted Maryland from extending its hazardous waste regulations to cover polychlorinated biphenyls ("PCBs"). That question was fully briefed and argued below, but was not reached by the Fourth Circuit because of its decision on abstention. *See* App. to Pet. at 14a ("Because we hold that abstention is ap-

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[2] The Attorney General is a respondent in this case. Pet. at ii.

[3] The letter is reproduced in full in the appendix hereto.

[4] Should the Fourth Circuit hold after reconsideration that abstention is still required—because the state investigation may be reopened, or for some other reason—PEPCO would certainly seek review of that decision in this Court.

propriate in this case, we do not address the merits of PEPCO's preemption claim").

A live controversy continues to exist between the parties with respect to the preemption issue. Quite apart from any threat of indictment by the grand jury, the State's effort to regulate PCBs has had a direct and immediate effect on PEPCO's ongoing operations. As explained in the petition, the State's regulatory activity has compelled PEPCO to alter its practices and has created a climate of uncertainty with respect to PEPCO facilities in Maryland. To cite one example, the state regulatory regime has forced PEPCO to adopt inefficient trucking and burning practices for oil shipped to its generating station in Maryland, since there is no storage facility at that site that complies with state as opposed to federal law. In addition, PEPCO has been compelled to restrict its use of other storage facilities in Maryland, and to alter its solicitation of bids for scrap transformers, to exclude bidders who might take the transformers into Maryland. *See* Pet. at 4-5; Ct. App. JA at 66-69, 127-129. The preemption question thus remains a live controversy ripe for judicial resolution. *See, e.g., Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983); *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498 (1972).

3. When an entire case has become moot, this Court as a matter of course will vacate the judgment and remand the case with directions to dismiss.[5] When only the

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[5] As the Court noted in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." As is clear from this quotation, the Court generally follows this practice with respect to cases at the certiorari stage as well as with respect to cases in which certiorari has previously been granted. *See, e.g., SEC* v. *Board of Trade*, 459 U.S. 1026 (1982); *State Fair of Texas* v. *Consumer Product Safety Comm'n*, 454 U.S. 1026 (1981). The reason for

issues presented to this Court have become moot, but the entire case has not, the case is remanded not with directions to dismiss but rather for whatever further proceedings may be appropriate. *See, e.g., University of Texas* v. *Camenisch*, 451 U.S. 390 (1981). In *United States Department of Justice* v. *Provenzano*, 469 U.S. 14 (1984), for example, the issue presented to the Court became moot due to a change in the law. The Court noted that "[t]he mootness of the particular issue that was presented to us, however, does not mean that the cases themselves do not remain alive." *Id.* at 15. The Court accordingly vacated the judgments below and remanded "for such further proceedings as are indicated." *Id.* at 15-16. *See also Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 415 (1972); *Bryan* v. *Austin*, 354 U.S. 933 (1957).

As with the application of *Munsingwear* to cases that are entirely moot, the Court follows this procedure for cases that are partially moot both with respect to cases at the jurisdictional stage and those awaiting decision on the merits. Indeed, in *Crowell* v. *Mader*, 444 U.S. 806 (1979), the Court, considering an appeal at the jurisdictional stage, vacated the case and remanded it with directions to dismiss as moot. On rehearing, the Court stated that such an order "is appropriate when an entire case has become moot but * * * is inappropriate when only the issues raised on appeal have been resolved." 444 U.S. 505, 506 (1980). Since the entire case had not in fact become moot, the Court vacated its prior order and instead "direct[ed] that the judgment * * * be vacated without prejudice to such further proceedings * * * as may be appropriate." *Id.* at 506.

More recently, in *Honig* v. *Students of the California School for the Blind*, 471 U.S. 148 (1985), the Court was

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this practice is clear: "the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *United States* v. *Munsingwear, Inc.*, 340 U.S. at 40.

confronted with a petition for certiorari in which "the only question of law actually ruled on by the Court of Appeals" had become moot, although other issues "still remain[ed] to be resolved" in the case. *Id.* at 149. The Court granted the petition for certiorari, vacated the judgment, and remanded for further proceedings. *Id.* at 150. The present case is in the same posture as *Honig*, and the same procedure should be followed.

The opinion and judgment below cannot stand. The court below held that "PEPCO's action must be dismissed and its claims pursued in Maryland courts." App. to Pet. at 19a. To the extent the question presented in PEPCO's petition has been rendered moot, PEPCO has been precluded from obtaining full review of the judgment, and it should therefore be vacated. Since the case as a whole is *not* moot, however, the case should be remanded not with instructions to dismiss but "for such further proceedings as are indicated." *United States Department of Justice* v. *Provenzano*, 469 U.S. at 16.

Respectfully submitted,

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APPENDIX

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[SEAL]

THE ATTORNEY GENERAL

December 9, 1986

Arnold M. Weiner, Esquire
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36 South Charles Street, 6th Floor
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Re: Potomac Electric Power Company

Dear Mr. Weiner:

A matter involving the Potomac Electric Power Company (PEPCO) has been investigated by this office since mid-1985. As you know, the same matter is presently being investigated by federal authorities. Given the extent of the federal interest, we have decided to suspend our own investigation involving PEPCO. As with all investigations by this office, the PEPCO matter is subject to re-examination should new evidence become available at a future time which would warrant re-opening of the investigation.

Sincerely,

/s/ James Lyko
JAMES LYKO
Assistant Attorney General

JL:jr

Supreme Court, U.S.
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CLERK

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REPLY BRIEF FOR PETITIONER

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---

REPLY BRIEF FOR PETITIONER

The State's brief in opposition ("Opp. Br.") simply confirms the need for this Court to grant the petition, vacate the judgment, and remand for such further proceedings as may be appropriate.[1] To the extent the State disagrees with PEPCO concerning the continuing viability of the present case, such disagreement demonstrates that the court below on remand, rather than this Court, should address such issues in the first instance.

In light of the State's decision to suspend its investigation of PEPCO, the only issue presented in the petition—the propriety of abstention in favor of a state

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[1] The statement required pursuant to Rule 28.1 appears in the petition at ii n.*.

grand jury investigation—has been rendered moot.[2] The entire case is not moot, however, since PEPCO's underlying preemption claim remains very much alive. The court below expressly recognized that it was able to avoid deciding PEPCO's preemption claim only because of its ruling on abstention. App. to Pet. at 14a. In such circumstances this Court routinely grants, vacates, and remands. *See, e.g., Honig* v. *Students of the California School for the Blind*, 471 U.S. 148 (1985); *Allen* v. *Ellisor*, 454 U.S. 807 (1981).

The State, for reasons that are not clear, seems anxious to avoid such a result. The State argues, for example, that this Court should deny the petition because a federal question has been lacking from the outset. Opp. Br. at 16-20. This argument was rejected by the court below, which held that "there is no merit to Maryland's argument that the district court lacked jurisdiction." App. to Pet. at 12a n.3. Significantly, the State did not file a cross-petition seeking a review of that determination. In any event, it is clear from this Court's recent decisions—cited by the court below—that a federal question is presented by PEPCO's preemption claim. *See Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, * * * presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to re-

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[2] Though both parties recognize that this issue is moot, the State nonetheless devotes the bulk of its opposition to arguing the merits of the issue. Opp. Br. at 7-16. PEPCO's disagreement with the State's position on the merits is fully developed in the Petition. We need only add that the State implicitly concedes a conflict between the decision below and *Monaghan* v. *Deakins*, 798 F.2d 632 (3d Cir. 1986), pet. for cert. pending, No. 86-890; its only response is that *Monaghan* is "an anomaly." Opp. Br. at 15.

solve"); *Lawrence County* v. *Lead-Deadwood School District*, 469 U.S. 256, 259 n.6 (1985).

The State also contends that there is no longer a case or controversy between the parties. Opp. Br. at 22-24. As PEPCO explained in its supplemental brief, its preemption claim remains a live controversy ripe for adjudication. Supp. Br. at 3. Indeed, PEPCO detailed the facts presenting a case or controversy "[q]uite apart from [the] pending investigation" in its petition, Pet. at 4, which was of course filed *before* the State decided to suspend its investigation. The State does not dispute these facts but instead seems to rest its position on what it perceives to be PEPCO's real intent in filing the lawsuit. Opp. Br. at 22-23. Even if intent were controlling—which it is not—the record demonstrates that a multiplicity of reasons in addition to the potential indictment underlay the bringing of this lawsuit. Pet. at 4-5. PEPCO's claim in no way depended exclusively on the pendency of the State's investigation, and the suspension of that investigation does not remove the dispute between the parties.[3]

Since there is still a live case or controversy between the parties, and since PEPCO's preemption claim remains ripe for decision, the case should be remanded for further proceedings. Even if this Court were uncertain as to whether the case remains live, remand would still be the appropriate disposition so that the Court of Ap-

[3] The State contends that the propriety of abstention "is determined as of when proceedings of substance occur in the district court." Opp. Br. at 25. This statement is correct, but completely irrelevant to the question of the appropriate disposition of this case now that the abstention issue is moot. The entire point is that PEPCO disagrees with the decision of the court below concerning the propriety of abstention "as of when proceedings of substance occur[red] in the district court." Because the State suspended its investigation, PEPCO has been denied the opportunity for full review of that decision. The judgment should accordingly be vacated and the case remanded.

peals could consider the question in the first instance. The issue presented in PEPCO's petition for certiorari became moot through no fault of PEPCO's, but by the action of the State after PEPCO filed its petition. Under such circumstances the judgment must be vacated; PEPCO should not be "prejudiced by a decision which in the statutory scheme was only preliminary." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). The decision on abstention was preliminary, and a decision on preemption is now warranted.

For the foregoing reasons, and those in the Supplemental Brief, the petition should be granted, the judgment below vacated, and the case remanded for such further proceedings as may be appropriate.

Respectfully submitted,

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No. 86-871

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

STEPHEN H. SACHS,
ATTORNEY GENERAL OF MARYLAND, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, the Attorney General of Maryland[1] and the Secretary of the Maryland Department of Health and Mental Hygiene ("the State"), submit this supplemental brief to call the Court's attention to an important factual and legal development which occurred subsequent to the filing of the State's Brief in Opposition.[2] On January 15, 1987, the United States District Court for the District of Maryland (Black, J.), following the duly issued mandate of the United States Court of Appeals for the Fourth Circuit, dismissed this case. The district court's Order and

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[1] This case is against the Attorney General in his official capacity only. Stephen H. Sachs was the Attorney General of Maryland until January 12, 1987, when the current Attorney General, J. Joseph Curran, Jr., was sworn in by the Governor of Maryland. Pursuant to Supreme Court Rule 40.3, Attorney General Curran is substituted herein as a respondent. However, in the interest of avoiding confusion and because no formal order of substitution has been entered, the case caption has not been changed.

[2] See Supreme Court Rule 22.6.

Judgment is reproduced in full in the appendix hereto.

Petitioner, Potomac Electric Power Company ("PEPCO"), in its Supplemental Brief and again in its Reply Brief concedes that the sole issue presented by its petition is moot in light of the State's suspension of its criminal investigation of PEPCO.[3] See, e.g., Reply Brief at 1-2.[4] Nevertheless, PEPCO asks this Court to remand this case to the Fourth Circuit for proceedings on the merits of PEPCO's claim that Maryland's PCB hazardous waste disposal laws are preempted

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[3] The sole issue presented by the petition is whether the Fourth Circuit was correct when it held that the doctrine of Younger v. Harris, 401 U.S. 37 (1971), applies to state grand jury proceedings.

[4] "In light of the State's decision to suspend its investigation of PEPCO, the only issue presented in the petition - the propriety of abstention in favor of a state grand jury proceeding - has been rendered moot." PEPCO's Reply Brief at 1-2 (footnote omitted).

by federal law. E.g., Id. at 4.[5] Clearly, this request is not appropriate now. There is no basis for further proceedings because (1) the case has been properly dismissed, and (2) the appeal period for the district court's order of dismissal has expired and no appeal has been noted.[6]

The judgment of the Fourth Circuit in this case was entered on October 17, 1986. See 802 F.2d 1527 (reprinted in the Appendix to PEPCO's petition (Pet. App.) at App. 1a, 10a). Thus, because PEPCO never filed a motion pursuant to F.R.App.P. 41(b) to stay

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[5] The district court held that the State's laws are not preempted. 639 F.Supp. 856 (D.Md. 1986) (reprinted in the Appendix to PEPCO's petition at App. 31a).

[6] The district court's final Order and Judgment is dated January 15, 1987, and it was entered January 16, 1987. See Appendix. Thus, the final date for appeal was February 17, 1987, as "30 days after the date of entry of the judgment," F.R.App.P. 4(a)(1), was February 15, a Sunday, and February 16 was a holiday. As of March 2, 1987, no notice of appeal has been filed.

the issuance of the mandate, the Fourth Circuit's mandate issued - as it was required to issue - 21 days after the entry of judgment. F.R.App.P. 41(a).[7] That mandate directed the district court to dismiss this case: "On remand, PEPCO's action must be dismissed and its claims pursued in Maryland courts." 802 F.2d at 1532 (Pet. App. at 19a).

The district court, of course, had no alternative but to carry out the unequivocal terms of the Fourth Circuit's order of dismissal as there was no stay, or even a Fed.R.App.P. 41(b) request for a stay, of that order. See In re Sanford Fork & Tool Co., 160 U.S. 247, 255-56 (1895) ("The circuit court is bound by the decree as the

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[7] F.R.App.P. 41(a) provides, in part, as follows: "The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order."

law of the case, and must carry it into execution according to the mandate."). Plainly, the fact that PEPCO filed a petition for certiorari does not operate "as a stay, either with respect to the execution of the judgment below or the issuance of the mandate below to a lower court." R.L. Stern & E. Gressman, Supreme Court Practice 847 (5th ed. 1978) (footnote omitted). Similarly, issuance of the mandate by the Fourth Circuit terminated that court's jurisdiction. United States v. DiLapi, 651 F.2d 140, 144 (2d Cir. 1981), cert. denied, 455 U.S. 938 (1982).

The issuance of the Fourth Circuit's mandate "does not defeat the jurisdiction of this Court." Carr v. Zaja, 283 U.S. 52, 53 (1931). Here, however, petitioner no longer asks this Court to exercise its jurisdiction to decide the sole question presented by its petition because it concedes that that question is moot. Rather, PEPCO asks this Court

not to decide the question raised by its petition while simultaneously asking this Court to remand this case to the Fourth Circuit where that court would be asked to decide the merits of a dismissed case.

The altogether proper, indeed mandatory, dismissal of this case by the district court, pursuant to the properly issued mandate of the Fourth Circuit, brings this matter to an end. PEPCO's dogged efforts to resuscitate and prolong this case should be rejected. There is no reason to remand to the Fourth Circuit for further proceedings.[8]

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[8] See also State's Brief in Opposition at 21-26 (arguing that absent the threat of criminal prosecution there is no justiciable case or controversy).

PEPCO's petition for a writ of certiorari should be denied.

Respectfully submitted

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APPENDIX



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE POTOMAC ELECTRIC POWER COMPANY	:	
v.	:	CIVIL ACTION NO. B-86-220
STEPHEN H. SACHS, in his capacity as Attorney General of Maryland, et al.	:	

ORDER AND JUDGMENT

By opinion rendered on October 17, 1986, the United States Court of Appeals for the Fourth Circuit reversed this Court's decision in the captioned litigation, and remanded the action for dismissal of plaintiff's claims.

Accordingly, IT IS, this 15th day of January, 1987, ORDERED and the same hereby IS, DISMISSED.

(signed)
Walter E. Black, Jr.
United States District Judge

✓ Filed ✓ Entered
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January 16, 1987
at Baltimore
Clerk, U.S. District Court
District of Maryland

Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-871

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v.
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF II

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SUPPLEMENTAL BRIEF II

Petitioner, The Potomac Electric Power Company ("PEPCO"), submits this brief pursuant to Supreme Court Rule 22.6 in response to the Supplemental Brief recently filed by respondents. Respondents contend in their Supplemental Brief that there is no basis for further proceedings in this Court because the District Court routinely complied with the mandate of the Court of Appeals during the pendency of the petition for certiorari.[1]

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[1] In its first supplemental brief, PEPCO alerted the Court to the State's decision to drop its grand jury investigation, and noted

Contrary to respondents' suggestion, the order of the District Court dismissing petitioner's complaint—issued while the case was pending before *this* Court on petition for writ of certiorari—in no way deprives this Court of jurisdiction. The District Court order was issued as a matter of course upon receipt of the mandate from the Court of Appeals. It has long been settled that "the fact that the mandate of the Circuit Court of Appeals has issued [does not] defeat this Court's jurisdiction." *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 467 (1947). A similar claim was presented in *Carr* v. *Zaja*, 283 U.S. 52 (1931). Justice Holmes, writing for a unanimous Court, rejected the claim:

> It is objected that the mandate of the Circuit Court of Appeals was not stayed, but was issued to the District Court and spread upon its records and that therefore the case is finished. *But that does not defeat the jurisdiction of this Court.* [*Id.* at 53 (emphasis supplied).]

This Court clearly retains jurisdiction to review the decision below. If this Court grants the writ and remands for consideration of the preemption issue—as urged by PEPCO—the District Court would simply reinstate PEPCO's complaint. In this regard the case is no different from a typical case in which the judgment directs the payment of money damages or a fine. The satisfaction of the judgment while review is sought in this Court does not deprive this Court of jurisdiction. As the Court held long ago, "[i]f the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights." *Erwin* v. *Lowry*, 7 How. 172, 184 (1849). So too here, if this

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that the appropriate disposition of the case in light of that development would be to grant the writ, vacate the judgment below, and remand for consideration of the preemption issue. Respondents' supplemental brief is based on subsequent developments that PEPCO has not yet had an opportunity to address.

Court vacates and remands, it would be "the duty" of the District Court to restore PEPCO's complaint, since the complaint was only dismissed pursuant to a judgment vacated by this Court.[2]

Acceptance of respondents' argument would require those seeking review in this Court to obtain a stay in *every* case, lest entry of judgment upon the routine issuance of the mandate by the Court of Appeals be deemed to deprive this Court of jurisdiction. Yet such a rule would be wholly inconsistent with the standards frequently articulated by the Justices of this Court concerning *when* a stay is appropriate.[3] It has never been suggested that denial of a stay pending certiorari would deprive this Court of jurisdiction, simply because the mandate would thereby issue from the Court of Appeals. Since PEPCO would in no sense have been irreparably harmed pending review by this Court if a stay were denied, it would have been wholly inappropriate for PEPCO to seek a stay in this case.

The issuance of the mandate by the court below, and the action of the District Court upon receipt of that mandate, are simply irrelevant to the exercise of juris-

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[2] Respondents note that no appeal was taken from the District Court's action pursuant to issuance of the mandate. Resp. Supp. Br. at 4. PEPCO has, of course, appealed the sole basis for that action—the judgment of the Court of Appeals—to this Court, through the pending petition for certiorari. The suggestion that another appeal should have been taken to the Court of Appeals, and presumably another petition for certiorari filed, and the cycle repeated indefinitely as mandates issued seriatim from the court below, does not warrant serious consideration.

[3] *See, e.g., Bellotti* v. *Latino Political Action Comm.*, 463 U.S. 1319 (1983) (Brennan, J., in chambers); *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315 (1983) (Blackmun, J., in chambers); *White* v. *Florida*, 458 U.S. 1301 (1982) (Powell, J., in chambers); *Barthuli* v. *Board of Trustees*, 434 U.S. 1337 (1977) (Rehnquist, J., in chambers); *Beame* v. *Friends of the Earth*, 434 U.S. 1310 (1977) (Marshall, J., in chambers).

diction by this Court.[4] Here, the District Court only acted pursuant to a decision presently under review in this Court. If this Court reverses or vacates that decision, the District Court can readily restore petitioner to its rights, as would be required by the mandate of *this* Court.

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[4] The State seems to concede that issuance of the mandate below does not normally defeat jurisdiction, but suggests a different result in this case because of the relief now sought by PEPCO, in light of the dropping of the state grand jury investigation. Resp. Supp. Br. at 6-7. If this Court has jurisdiction, however, it has jurisdiction to enter any appropriate order.